Supreme Court, U.S.
FILED

No. 051353 APR 24 2006

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT BENSON and
JUDITH BENSON,

Petitioners,

v.

STATE OF SOUTH DAKOTA; M. MICHAEL ROUNDS, in his official capacity as Governor of the State of South Dakota; LARRY LONG, in his official capacity as Attorney General of the State of South Dakota; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; and JOHN COOPER, in his official capacity as Secretary of the South Dakota Department of Game, Fish and Parks,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

PETITION FOR WRIT OF CERTIORARI

JOSEPH F. BECKER*
**Counsel of Record*
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioners

CUSTOM LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), this Court held that "the right to exclude is one of the most essential sticks in the bundle of rights that are commonly characterized as property" and "where a governmental action results in a permanent physical occupation of the property, by the government itself or by others, the Court's cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit." This petition presents the following questions:

1. Whether a state action that makes "lawful" and subsequently results in shooting across and onto private property from public rights-of-way constitutes a taking under the Fifth Amendment to the United States Constitution?

2. Whether a taking occurs under the Fifth Amendment between such time as a State makes "lawful" the act of shooting across and onto private property from public rights-of-way and such later time as that State adopts a *post hoc* "mere decriminalization" defense to a takings claim?

3. Whether an after-the-fact civil remedy is adequate to preclude a Fifth Amendment takings claim when State action results in repeated physical invasions of private property by potentially fatal projectiles?

LIST OF PARTIES

Robert Benson and Judith Benson are residents of the State of South Dakota and landowners therein. They were Plaintiffs before the Circuit Court of the Sixth Judicial District, Tripp County, South Dakota and Appellees before the Supreme Court of South Dakota. The other two parties to the case below, Jeff Messmer and Tricia Messmer, are not parties to this petition.

The State of South Dakota; M. Michael Rounds, in his official capacity as Governor of the State of South Dakota; Larry Long, in his official capacity as Attorney General of the State of South Dakota; South Dakota Department of Game, Fish and Parks; and John Cooper, in his official capacity as Secretary of the South Dakota Department of Game, Fish and Parks, were Defendants before the Circuit Court of the Sixth Judicial District and Appellants before the Supreme Court of South Dakota.

STATEMENT OF RELATED CASES

There are no related cases.

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	i
LIST OF PARTIES	ii
STATEMENT OF RELATED CASES	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
ARGUMENT	7
I. THE SOUTH DAKOTA SUPREME COURT DEFIED THIS COURT'S PRECEDENTS WHEN IT HELD THAT STATE ACTION RESULTING IN PHYSICAL OCCUPATION OF PRIVATE PROPERTY DOES NOT CONSTITUTE A *PER SE* TAKING	7
A. Section 41-9-1.1(2) Is A Categorical Taking Because It Results In A Permanent Physical Invasion That Interferes With A Landowner's Right To Exclude	9
1. A physical invasion is a taking *per se*	9
2. The firing of guns over and onto private property is a physical invasion	11

TABLE OF CONTENTS – Continued

Page

II. AT A MINIMUM, A *PER SE* TAKING OCCURRED FROM THE TIME THAT SOUTH DAKOTA OFFICIALLY DECLARED SHOOTING ONTO PRIVATE PROPERTY LAWFUL AND SUCH TIME AS THE SUPREME COURT EMBRACED THE STATE'S *POST HOC* "DECRIMINALIZATION" DEFENSE 15

A. The Hunting Public Was Placed Repeatedly On Notice That Shooting Onto And Across Private Property Was Fully Lawful 17

1. The Legislature intended to and did, in fact, fully legalize shooting onto private property and, in so doing, provided notice to the hunting public of such lawfulness 17

2. The South Dakota Department of Game, Fish and Parks provided further notice to the public that shooting onto private property is "lawful" 19

3. The South Dakota Attorney General's Office provided further notice to the hunting public that shooting onto private property "is allowed" 20

4. The South Dakota Supreme Court itself provided notice that shooting onto private property was lawful 21

B. Attempts To Pursue A Civil Remedy In Trespass Prior To The South Dakota Supreme Court's Adoption Of The "Decriminalization" Defense Would Have Resulted In Criminal Sanctions Against The Bensons 22

TABLE OF CONTENTS – Continued

Page

C. South Dakota's Notice Of Lawfulness Combined With The Resulting Physical Invasions Is A *Per Se* Taking Of The Bensons' Property 22

III. AN AFTER-THE-FACT CIVIL REMEDY IS NOT A CONSTITUTIONALLY VIABLE SUBSTITUTE FOR THE RIGHT TO EXCLUDE AND THIS CASE WARRANTS REVIEW TO PREVENT THE "DECRIMINALIZATION" DEFENSE FROM ERODING THAT ESSENTIAL RIGHT 24

CONCLUSION 28

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Armstrong v. United States, 364 U.S. 40 (1960) 26

Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824 (9th Cir. 2004) 16

Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765) 27

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 16, 23

Hinman v. Pacific Air Transport, 84 F.2d 755 (9th Cir. 1936) 12

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 16

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) ..... *passim*

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 9, 10

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 6, 10, 25

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 9, 14

Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) 11

Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) 15

U.S. v. Causby, 328 U.S. 256 (1946) 6, 11, 12

TABLE OF AUTHORITIES – Continued

Page

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 26

Wilfong v. United States, 480 F.2d 1326 (Ct. Cl. 1973) 12

STATE CASES

Alcorn v. Edmonds County, 241 N.W.2d 323 (S.D. 1932) 24

Benson v. State, 710 N.W.2d 131 (S.D. 2006).... 1, 14, 15, 26

Butler v. Frontier Telephone Co., 79 N.E. 716 (N.Y. Ct. App. 1906) 12

Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc., 624 N.W.2d 796 (Minn. App. 2001)..... 11, 12

Delta Air Corp. v. Kersey, 20 S.E.2d 245 (Ga. 1942)..... 12

Digirolamo v. Philadelphia Gun Club, 89 A.2d 357 (Penn. 1952)..... 12

Nolan and Nolan v. City of Eagan, 673 N.W.2d 487 (Minn. App. 2003) 24

Reis v. Miller, 550 N.W.2d 78 (S.D. 1996)..... 22

SDDS, Inc. v. State, 650 N.W.2d 1 (S.D. 2002)..... 10

State v. Rumpca, 652 N.W.2d 795 (S.D. 2002).... 7, 18, 21, 22

State v. Tracy, 539 N.W.2d 327 (S.D. 1995) 22

State v. Wilkinson, 724 So.2d 614 (Fla. Dist. Ct. App. 1998)..... 11

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

S.D. Const. art. VI, § 1 27

S.D. Const. art. VI, § 13 24

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XIV 2, 9

FEDERAL STATUTES

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 ..... 3, 5

SOUTH DAKOTA CODIFIED LAWS

§ 15-26A-38 ..... 1, 5

§ 22-18-4 23

§ 41-1-8 ..... 22, 23

§ 41-9-1 13

§ 41-9-1.1 14

§ 41-9-1.1(2) ..... *passim*

§ 43-2-1 24

§ 50-13-3 11

OTHER AUTHORITIES

The Declaration of Independence, ¶ 2 (U.S. 1776) 27

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 10

TABLE OF AUTHORITIES – Continued

Page

Ralph Ketcham, *James Madison: A Biography* (Univ. of Virginia Press 1990) 26

Vincent Michael Roche, *Road Hunting Shot Down: Reflecting on the South Dakota Supreme Court's Decision in State v. Rumpca*, 7 Great Plains Nat. Resources J. 31 (2003) 7

PETITION FOR WRIT OF CERTIORARI

Petitioners Robert and Judith Benson respectfully petition this Court for a *writ* of *certiorari* to review the judgment of the South Dakota Supreme Court.

OPINIONS BELOW

Review is sought of the opinion of the South Dakota Supreme Court, filed on January 24, 2006, denying Petitioners relief under the Fifth Amendment to the United States Constitution. *Benson v. State of South Dakota*, 710 N.W.2d 131 (S.D. 2006). App. 1-68. The South Dakota Supreme Court's decision affirmed in part and reversed in part the decision of the trial court, the Circuit Court of the Sixth Judicial District, Tripp County, South Dakota. The trial court's order granting Petitioners' motion for summary judgment and injunctive relief was issued on December 27, 2004. App. 71-74. Under S.D. Codified Laws § 15-26A-38, however, Respondents enjoyed an "automatic" stay beginning one day later on December 28, 2004, and lasting through January 24, 2006. App. 105, 69.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The relevant provisions of the Fifth and Fourteenth Amendments to the United States Constitution are set forth in the Appendix. App. 103.

STATEMENT OF THE CASE

On March 22, 2003, after considerable debate devoted almost exclusively to whether the tradition of road hunting in South Dakota should take precedence over fundamental property rights, the South Dakota Legislature amended South Dakota hunting laws to provide that lawful "hunting on highways or other public rights-of-way" includes shooting at small game that is in flight over private land. S.D. Codified Laws § 41-9-1.1(2). The legislation also included a provision nullifying that change should the South Dakota Supreme Court later hold that the firing of potentially fatal projectiles over private property or the depositing of shot thereon results in a "taking."

Petitioners Robert and Judith Benson reside on and operate a ranch in Tripp County, South Dakota. The Bensons operate their ranch primarily for agricultural purposes, including the raising of livestock and a variety of crops; however, they also maintain private hunting grounds on their property. The Bensons' property is bordered by several miles of county and township roads that are used by the public for road hunting. During the nearly year-round hunting seasons since South Dakota made lawful the shooting over and onto private property, the Bensons have observed hunters shooting pheasants on their property, have detected buckshot as far as 200 feet

inside their property line, have heard shot strike metal buildings on their property, and have lost at least one window of their private residence due to shot traveling across and onto their property. For purposes of cross motions for summary judgment, South Dakota stipulated to these facts as sworn to by the Bensons. App. 77.

On October 23, 2003, the Bensons filed a Complaint in South Dakota state court claiming, *inter alia*, that South Dakota violated 42 U.S.C. § 1983 and the Fifth Amendment to the United States Constitution, which, in relevant part, provides that "private property [shall not] be taken for public use without just compensation." App. 103. Despite having previously published an official hunting manual describing the challenged action as "lawful," on November 18, 2003, South Dakota filed an answer to the Bensons' Complaint pleading twenty-two affirmative defenses, among which it argued, for the first time, that South Dakota had merely "decriminalized" shooting across and onto private property and that the Bensons' civil remedies remained intact and therefore no "taking" had occurred.

On January 5, 2004, and February 27, 2004, the Bensons and the State of South Dakota, respectively, filed cross motions for summary judgment, and on June 30, 2004, the trial court held a hearing on those motions. On November 30, 2004, the trial court issued a Memorandum Decision (App. 75-102) holding, *inter alia*, that:

1. There is no merit in the State's argument that the South Dakota Legislature merely "decriminalized" the act of shooting onto private property.

2. The Hunting Handbook, App. 108-114, in defining the act of shooting onto private property as "lawful," placed hunters on notice that hunting pursuant to S.D. Codified Laws § 41-9-1.1(2) is not a trespass and that hunters who hunt in this manner may not be prevented from or prosecuted for doing so by landowners.

3. The Hunting Handbook, in providing that it is "a synopsis of South Dakota Codified Laws and Game, Fish and Parks rules" regarding hunting, placed hunters on notice that those hunters who act in accordance with its provisions do so in the knowledge that they are free from self-help action or civil or criminal court actions by landowners.

4. If landowners were to defend their ownership and right to exclusive use of their property, they would face prosecution under S.D. Codified Laws § 41-1-8 for "intentionally interfering with person lawfully engaged in hunting."

5. An after-the-fact civil trespass remedy is not a constitutionally acceptable substitute for the right to exclude others initially from private property.

6. The landowners' right to exclude others from their private property has been taken under both the South Dakota and United States Constitutions.

On December 27, 2004, a final order was entered by the trial court granting the Bensons' motion for summary judgment, denying South Dakota's motion for summary

judgment, and awarding the Bensons reasonable costs and attorneys fees under 42 U.S.C. § 1983. On December 28, 2004, the State appealed to the South Dakota Supreme Court and invoked a stay pursuant to S.D. Codified Laws § 15-26A-38, a provision which provides that:

> When the state, any state board or officer, any county, township, municipal corporation, school district, or its officers, in a purely official capacity, shall take an appeal, service and filing of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from and no undertaking or bond need be given, but the Supreme Court may, on motion, require security to be given in such form and manner as it shall in its discretion prescribe as a condition of the further prosecution of the appeal.

App. 105.

On August 31, 2005, the South Dakota Supreme Court heard oral arguments on this matter, and on January 24, 2006, it issued a split decision holding that the South Dakota Legislature merely "decriminalized" the shooting onto and across private property and that, because civil trespass remedies remained intact, no taking had occurred under either the South Dakota or United States Constitutions. App. 1. Two of the five Justices found no merit in the State's "decriminalization" argument, and one of those two found no unconstitutional taking because "the interference is episodic and seasonal" and "the thought of sending a state compensation check to a landowner each time some bird shot crosses a property line seems excessive." App. 58. Rather than invoke the physical invasion line of *per se* taking cases, that particular Justice employed the "*Penn*

Central balancing of interests" test in determining that "shooting over private property at wild game in flight . . . is a minimal intrusion and therefore not compensable." App. 59.

REASONS FOR GRANTING THE WRIT

This case raises fundamental questions of constitutional law regarding the application of the Takings Clause of the Fifth Amendment as well as the interpretation of this Court's "*per se* taking physical invasion" precedents by the South Dakota Supreme Court. This Court should grant review of the questions presented.

First, the decision below conflicts with several, well-established legal principles repeatedly articulated by this Court that establish that: (A) "the right to exclude is one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); (B) "where a governmental action results in a permanent physical occupation of the property, by the government itself or by others, the Court's cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit," *id.* at 831-32; and (C) "an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath." *U.S. v. Causby*, 328 U.S. 256, 265 n.10 (1946).

Second, the case warrants review because even if, *arguendo*, the South Dakota Supreme Court's errant adoption of the State's *post hoc* "decriminalization" defense were somehow correct, the South Dakota Supreme Court nevertheless erred in failing to find a taking between such

time as the State repeatedly put all persons on notice that shooting onto private property was fully lawful and the point at which, in defense of a takings claim, the State first invented its "mere decriminalization" defense. During the aforementioned time, the Bensons suffered multiple physical invasions of their private property "as a result of the State's actions," as stipulated to by the State. App. 77.

Third, this case warrants review because, as the trial court held, "an after the fact civil trespass remedy is not a constitutionally acceptable substitute for the right to exclude others initially from private property." App. 99.

ARGUMENT

I. THE SOUTH DAKOTA SUPREME COURT DEFIED THIS COURT'S PRECEDENTS WHEN IT HELD THAT STATE ACTION RESULTING IN PHYSICAL OCCUPATION OF PRIVATE PROPERTY DOES NOT CONSTITUTE A *PER SE* TAKING.

In *State v. Rumpca*, 652 N.W.2d 795, 798 (S.D. 2002), the South Dakota Supreme Court held that "[h]unters may not shoot game on private property from a road ditch or public property and then proceed on that private property to retrieve the game unlawfully taken," for when "a person relies on a statutory justification for trespass, he must bring himself fully within its terms." As a result of and in the year immediately following that decision, dissatisfied with the limits on road hunting enunciated in *Rumpca,* hunters and the organizations representing them turned to the South Dakota State Legislature with demands for more available public hunting.

The State can, and does, set aside publicly owned parcels of land on which its citizens may hunt. *See* Vincent

Michael Roche, *Road Hunting Shot Down: Reflecting on the South Dakota Supreme Court's Decision in State v. Rumpca,* 7 Great Plains Nat. Resources J. 31, 37 (2003). However, instead of purchasing more public land to meet the hunters' demands, the Legislature, in passing HB 1163, expanded the public easement on road rights-of-way to reach beyond the roadway, over the property line, and onto an individual property owner's land.

As a consequence of the State Legislature amending South Dakota hunting laws to provide that "hunting on highways or other public rights-of-way" includes shooting at small game that is in flight over private land, S.D. Codified Laws § 41-9-1.1(2), the South Dakota Department of Game, Fish and Parks published a Hunting Handbook describing such actions as "lawful." App. 110-112. Armed with a declaration by the State Attorney General's office that under HB 1163 shooting over private property "is allowed," App. 165, and a state-issued Hunting Handbook that describes itself as "a synopsis of South Dakota Codified Laws and Game, Fish and Park rules" regarding hunting, licensed hunters began firing potentially fatal projectiles across and onto the Bensons' property. By defining what is "lawful," the Hunting Handbook places hunters and landowners on notice that hunting pursuant to S.D. Codified Laws § 41-9-1.1(2) is not a trespass and that hunters who hunt in this manner may not be prevented from doing so by landowners. In an affidavit filed in support of their constitutional challenge, to which South Dakota stipulated for the purpose of summary judgment, the Bensons asserted that the incidence of shot traveling onto and across their land increased as a result of South Dakota making and repeatedly declaring such actions lawful.

For a taking to occur, this Court requires only that state action "result in" a physical occupation of the property, by the government itself or by others. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-435 (1982). Such is exactly the case here given that South Dakota's actions resulted in the occupation of the Bensons' property by a public shot in violation of both. Article VI, § 13, of the South Dakota Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Although this Court has not established a comprehensive formula for determining when a regulatory taking has occurred thus mandating remuneration,[1] it has narrowed regulatory takings analysis somewhat by deciding that: (1) a physical occupation, irrespective of how small, constitutes a *per se* taking, *Loretto*, 458 U.S. 419 (1982); and (2) a regulation that denies an owner all economically viable use is a *per se* taking. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

A. Section 41-9-1.1(2) Is A Categorical Taking Because It Results In A Permanent Physical Invasion That Interferes With A Landowner's Right To Exclude.

1. A physical invasion is a taking *per se*.

> [W]here governmental action results in "a permanent physical occupation" of the property, by the government itself or by others, [the United States Supreme Court] uniformly ha[s] found a taking to the extent of the occupation, without regard to whether the action achieves an important public

[1] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

> benefit or has only minimal economic impact on the owner.

Nollan, 483 U.S. at 831-832 (quoting *Loretto*, 458 U.S. at 432-435). "[A] physical invasion is a government intrusion of an unusually serious character," *Loretto*, 458 U.S. at 433, because "the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Nollan*, 483 U.S. at 831 (internal quotations omitted).

A "permanent physical invasion" occurs when "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U.S. at 832. Thus, "even if the government physically invades only an easement in property, it must nonetheless pay compensation." *Loretto*, 458 U.S. at 433. With regard to regulations that compel the property owner to suffer a physical invasion of his property, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [the U.S. Supreme Court] ha[s] required compensation." *Lucas*, 505 U.S. at 1015. Therefore, in the case of a physical invasion of private property, case-specific inquiry into the public interest advanced in support of the regulation is not permissible and compensation will be required. *Id.*; *see also* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) ("The modern significance of physical occupation is that courts . . . *never* deny compensation for a physical takeover.") (emphasis in original).

2. The firing of guns over and onto private property is a physical invasion.

"The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *Causby*, 328 U.S. at 264; S.D. Codified Laws § 50-13-3. This Court has held to be "clearly sound" the proposition that, if the government subordinated a strip of land "to the right and privilege of the Government to fire projectiles directly across it . . . whenever it saw fit . . . with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329 (1922). This Court further held that the taking of the property right would be complete "if the [government], with the admitted intent to fire across the claimants' land at will[,] should fire a single shot." *Id.*[2]

In *Portsmouth Harbor*, 260 U.S. at 330, repeated and cumulated firing over the plaintiffs' land by the government was held to amount to the imposition of a servitude and a compensable taking. Other courts have recognized that discharging guns over and across private land results in a direct invasion of the property. *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 805 (Minn. App. 2001) (entry of bullets over and onto adjacent private property constituted trespass); *State v. Wilkinson*, 724 So.2d 614 (Fla. Dist. Ct. App. 1998) (firing potentially lethal projectile across private land without permission constituted trespass). "Trespass is not limited

[2] "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." *Loretto*, 458 U.S. at 432 n.9.

to human entry and can include throwing or placing an object upon the property of another." *Citizens for a Safe Grant*, 624 N.W.2d at 805 (internal quotations omitted). Furthermore, a physical interference with the use and enjoyment of private property is a taking if the consequences imposed on the property are permanent, even if only intermittent, as in this case. *Wilfong v. United States*, 480 F.2d 1326, 1329 (Ct. Cl. 1973). In addition, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property" and "the owner [has] no control over the timing, extent, or nature of the invasion," as is the case here, where the Bensons are forced to open their private property to the public. *Loretto*, 458 U.S. at 436 (emphasis in original).

Moreover, an invasion of air space that interferes with the property owner's ability to use and enjoy that portion of the property is a taking; the soil need not be touched. *Causby*, 328 U.S. at 265 ("invasions of [airspace] are in the same category as invasions of the surface"); *Hinman v. Pacific Air Transport*, 84 F.2d 755, 758 (9th Cir. 1936) ("[landowner's] title to the air is paramount"); *Digirolamo v. Philadelphia Gun Club*, 89 A.2d 357, 358 (Penn. 1952) (passage of shotgun pellets through the air over plaintiff's land interfered with his enjoyment of land); *Delta Air Corp. v. Kersey*, 20 S.E.2d 245, 249 (Ga. 1942) (low overflights); *Butler v. Frontier Telephone Co.*, 79 N.E. 716, 718 (N.Y. Ct. App. 1906) (telephone wire strung across plaintiff's property). Of course, in this case, not only is the air space invaded such that the Bensons are denied the ability to use and enjoy the portions of their property affected by S.D. Codified Laws § 41-9-1.1(2), but also the soil is invaded and littered with shots of lead and steel.

Even if, *arguendo*, some right of civil trespass remained throughout the time during which the Bensons have suffered the occupation of projectiles, for a taking to occur this Court requires only that state action "result in" a physical occupation of the property, by the government itself or by others. *Loretto*, 458 U.S. at 432-435. That is exactly the case here. Irrespective of any purported after-the-fact civil remedy that may somehow remain available to the Bensons, by passing its new hunting law and by publishing a Hunting Handbook in which the State declares that shooting onto private land is "lawful," the State has acted in a way that directly encouraged and "result[ed] in" physical invasions of the Bensons' private property. Hence, a taking of that property has occurred irrespective of some alleged and highly technical lack of authorization from the State.

To say that there is no taking here because the State is only "decriminalizing" a certain hunting provision is to ignore the State's comprehensive regulatory system controlling every aspect of hunting. By making an exception to the general prohibition in S.D. Codified Laws § 41-9-1 against hunting on private property without owner consent, the Legislature has itself effectively granted consent to hunters to shoot over private property as if that property were in the public domain. No other conclusion may be gained from a plain reading of the statute, which provides, in relevant part, that lawful "hunting on highways or other public rights-of-way includes . . . (2) [t]he shooting at or taking by legal methods of small game, except mourning dove, that are in flight *over private land* if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or

public right-of-way." S.D. Codified Laws § 41-9-1.1(2) (emphasis added). App. 106. The contrary conclusion reached by the South Dakota Supreme Court that the statute does not make lawful and encourage the shooting over private property is simply incorrect. Legislative action now legitimizes the shooting at certain small game that are in flight over private property. That hunters must be licensed by the State and be hunting during the lawful season set by the State before they may shoot over private property only fortifies this conclusion. Saying that landowners still maintain their civil remedies and that, after the fact, they may protect themselves against trespass by suing road hunters "cannot mollify the State's part in consenting to road hunting on private property." *Benson*, 710 N.W.2d at 163-164 (Justice Kokenkamp concurring only in result because of his misapplication of *Penn Central* to what is clearly a *per se* physical invasion case).

The Legislature's intended result was obvious to one Justice:

> Further, if the Legislature intended to merely affirm the private property owners' right to exclude road hunters altogether, why did the Legislature provide for automatic repeal if the statute was found to be a taking? The automatic repeal provides: "If [S.D. Codified Laws § 41-9-1.1(2)] is declared by an advisory opinion or adjudication of the South Dakota Supreme Court to be a taking of private property requiring compensation, subdivision (2) is void." [S.D. Codified Laws §] 41-9-1.1. Based on the plain language as well as the background of the statute, I would conclude that the underlying intent of the statute was to expand the definition of road hunting to include shooting at birds that fly from the roadway onto

> private land, and that the State effectively enlarged the hunting easement to include the depth of shot over private property. The effect of the amendment takes away the property owners' right to exclude road hunters from invading their property and the airspace above it. Because of the amendment, the extent of the hunting easement is now the distance gunshot can travel from the roadway easement onto the land.

Benson, 710 N.W.2d at 167 (Justice Meierhenry dissenting).

South Dakota took "actions that resulted in" a dangerous physical occupation of the Bensons' private property by the hunting public and, because the South Dakota Supreme Court found no taking, despite all this Court's opinions to the contrary, this Court should review the holding of the South Dakota Supreme Court.

II. AT A MINIMUM, A *PER SE* TAKING OCCURRED FROM THE TIME THAT SOUTH DAKOTA OFFICIALLY DECLARED SHOOTING ONTO PRIVATE PROPERTY LAWFUL AND SUCH TIME AS THE SUPREME COURT EMBRACED THE STATE'S *POST HOC* "DECRIMINALIZATION" DEFENSE.

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner[.]" *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 322 (2002) (citation omitted). "Where this burden results from governmental action that amounted to a taking, the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the

value of the use of the land *during this period.*" *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319 (1987) (emphasis added). "[N]o subsequent action by the government can relieve it of the duty to provide *compensation for the period during which the taking was effective.*" *Id.* at 321 (emphasis added). "And even if the Government physically invades only an easement in property, it must nonetheless pay compensation." *Kaiser Aetna v. United States,* 444 U.S. 164, 180 (1979). "Together, these cases stand for a clear proposition: once the government executes a taking, the Constitution does not permit it to shift the public's burden of just compensation to third parties. When property is taken for public use under the Fifth Amendment, the public – and not specific individuals or groups at the order of the government must pay." *Carson Harbor Village, Ltd. v. City of Carson,* 353 F.3d 824, 831 (9th Cir. 2004).

Although admittedly this Court should be hesitant to second guess the South Dakota Supreme Court's interpretation of that State's statutes, all evidence clearly demonstrates that "decriminalization" was nothing more than one of a total of twenty-two affirmative defenses raised, *post hoc*, by South Dakota in an attempt to defend against the *per se* taking authorized by the South Dakota Legislature. In fact, the Attorney General's office itself described the effect of the action taken by the Legislature to be that shooting onto private property is "allowed" when, on April 8, 2003, it summarized the recently passed legislation. App. 165. Insofar as hunters fired potentially fatal projectiles onto the Bensons' private property, pursuant to and as a result of repeated notification by the State that shooting onto private property was "lawful" and "allowed," a taking occurred at least between the time that the public

was so notified by the State and the time that the State Supreme Court, several years later, embraced the State's argument that only a mere "decriminalization" had taken place. At a minimum, the taking occurred through such time as South Dakota first raised its mere "decriminalization" defense because during that time the Bensons suffered physical invasion by shots.

A. The Hunting Public Was Placed Repeatedly On Notice That Shooting Onto And Across Private Property Was Fully Lawful.

1. The Legislature intended to and did, in fact, fully legalize shooting onto private property and, in so doing, provided notice to the hunting public of such lawfulness.

The Legislature well understood that it was fully "legalizing" the ability of hunters to shoot onto and over private land.[3] In fact, it attempted to remedy what it

---

[3] *E.g.*, Rep. Frost: "Well ladies and gentleman of the body. I think we've finally gotten to the point where this bill could pass out of the House. I remember when I was growing up we didn't have trespass laws and what a wonderful thing that was, and I had boys that liked to hunt and we watched things change and they went the other way. I think we're at the point in our lives where maybe we could bring it back just a little bit. There has [sic] been some compromises. I think this is a good bill; like I say it's not perfect, but I think we can move it on. Let's do it tonight. Let's get on with it. Thank you." App. 123.

Rep. Lintz: "What you're doing is that you're driving a wedge between the landowners and hunters. Representative Rhoden is very right. It's a joke ladies and gentlemen if you think that the state can take care of the trespass law. If you have ever had a person trespass on your place and try to get somebody to arrest them and prosecute, it's almost impossible in this state. Now, we want to give them the right to

(Continued on following page)

perceived to be an undesirable outcome in the South Dakota Supreme Court's *Rumpca* decision.[4] In *Rumpca*, 652 N.W.2d 795 (S.D. 2002), the South Dakota Supreme Court upheld the criminal conviction of a hunter who shot game over private property albeit from a public-right-of-way road ditch. This is precisely the activity the South Dakota Legislature intended to make fully legal.

The State itself conceded in its brief to the South Dakota Supreme Court that the Legislature attempted to make shooting onto private land legal in response to the South Dakota Supreme Court's decision in *Rumpca*. Thus, there is no reason whatsoever to believe, other than the State's *post hoc* justification to evade a finding of a "taking" in the Bensons' lawsuit, that the Legislature contemplated that Mr. Rumpca could still be sued "civilly" for that which it fully intended to make "legal."

In fact, the legislative debate as to this matter consisted almost exclusively of whether the "tradition of road hunting" should be expanded onto private property at the expense of the "constitutional rights of property owners."

---

trespass with a gun, shoot, do anything that they wish to do, and where does our landowners rights come in?" App. 126.

[4] *See, e.g.*, Floor Statement of Rep. Hundstad: "I want to just read you a few words from the Supreme Court decision that was handed down that brought this bill to us today: 'a trespass may be committed on, beneath, or above the surface of the earth with the exceptions of flight by aircraft.'" [Quoting *Rumpca*, 652 N.W. 2d at 798.] App. 125.

See also Floor Statement of Sen. Diedrich: "Senator McCracken, you just told us that if we didn't pass 1163 today, that we would probably have a referendum. Is there something that's happened or changed recently that leads you to believe that?" Floor Statement of Senator McCracken, in response: "I believe that there was an incident that involved a court case earlier this year or last year that has prompted [us] to bring this forward." App. 139-140.

App. 115-64. This Court should take note that nowhere in the entire legislative debate, as made available on the South Dakota State Legislature's official website, is contained the word "crime," "criminality," or "decriminalization." App. 115-64. That the Legislature intended to make "lawful" the firing over and onto private land is clear from its inclusion of the provision declaring that, "if subdivision (2) is determined to be a taking of private property requiring compensation, subdivision (2) is void." App. 106. This Court should grant no deference to the South Dakota Supreme Court's interpretation of that statute because that interpretation conflicts so directly with the expressly stated intent of the Legislators themselves, one after another and as a body. App. 115-64.

2. The South Dakota Department of Game, Fish and Parks provided further notice to the public that shooting onto private property is "lawful."

The State does not deny that the Bensons' private property is invaded as a result of the Legislature's actions; in fact, it stipulates thereto. App. 77. The State merely attempts to deny responsibility for that outcome by claiming that some other remedy remains with the Bensons.

Yet, what the State argued subsequent to being sued is inconsistent with what it had informed hunters and property owners regarding the action taken by the State Legislature. In an official State hunting guide, the South Dakota Hunting Handbook (2003), shooting onto private land is described as "lawful." The Hunting Handbook provides that "[t]o be *lawfully* taken from a public road right-of-way, the hunter must be within the right-of-way boundaries when shooting, and the game must originate

from or be flying over the road right-of-way." App. 114. *See also* App. 96. By defining what is "lawful," the Hunting Handbook places hunters and landowners on notice that hunting pursuant to S.D. Codified Laws § 41-9-1.1(2) is not a trespass and that hunters who hunt in this manner may not be prevented from doing so by landowners.[5] Moreover, the Hunting Handbook provides that it is "a synopsis of South Dakota Codified Laws and Game, Fish and Park rules regarding hunting." App. 110.

The trial court found, as a matter of fact, that "hunters who act in accordance with [the Handbook's] provisions do so with the knowledge and belief that they are free from self-help action or civil or criminal court action by landowners." App. 96.

In its chapter on "General Laws," the Hunting Handbook also contains a section entitled "Civil Damage Liability," in which it references potential civil actions. App. 113. Yet, nowhere within this section is there any reference to the statute in question or any warning that a hunter may be liable in civil trespass when acting in accordance with what the Handbook defines as "lawful." App. 113. In fact, the Hunting Handbook makes clear to the hunter that he is not liable for civil trespass!

3. The South Dakota Attorney General's Office provided further notice to the hunting public that shooting onto private property "is allowed."

The South Dakota Attorney General's Office regularly summarizes legislation passed by the South Dakota Legislature. In just such an official memorandum, dated

---

[5] Subsequent Hunting Handbooks contain identical language.

April 8, 2003, the legislation in question is described as "allow[ing] a hunter to shoot over private property if the bird [is] flushed within the public right-of-way." App. 165.

4. The South Dakota Supreme Court itself provided notice that shooting onto private property was lawful.

In upholding Mr. Rumpca's conviction, the South Dakota Supreme Court explored whether, had the facts been as Mr. Rumpca alleged (*i.e.*, he shot game that had originated in the public right-of-way and was merely entering private property to retrieve the game), Mr. Rumpca would have been justified in trespassing on private land:

> It is important, however, to note that when a person relies on a statutory justification for trespass, he must bring himself fully within its terms. (citation omitted). If a hunter expects to enjoy the statutorily created exception to trespass he must comply strictly with the terms.

Rumpca, 652 N.W.2d at 798.

The South Dakota Supreme Court then gave one such example of a statutory defense to trespass both currently in effect and in effect at the time of Mr. Rumpca's trespass:

> Unarmed retrieval is a very narrow affirmative defense for trespass. Any hunter who does not meet the criteria . . . would have no statutory justification for entering private property. . . . Neither may hunters enter private property under the pretext of looking for downed game in an effort to flush wild game from private property to a public right of way or public hunting area.

> Hunters must be very careful and responsible in exercising this limited privilege that [S.D. Codified Laws §] 41-9-8 now provides.

Rumpca, 652 N.W.2d at 798-99 (emphasis in original removed) (an action now made "lawful" by § 41-9-1.1(2)).

B. Attempts To Pursue A Civil Remedy In Trespass Prior To The South Dakota Supreme Court's Adoption Of The "Decriminalization" Defense Would Have Resulted In Criminal Sanctions Against The Bensons.

Had either Robert or Judith Benson, prior to the South Dakota Supreme Court's holding in this case, confronted these armed and so-called "civil trespassers" as they shot from the public roadway onto the Bensons' land (say for purposes of identification and/or service of process, as the State now informs them they may do), the Bensons would have run afoul of and faced criminal prosecution by the State under S.D. Codified Laws § 41-1-8 for "intentionally interfer[ing] with persons lawfully engaged in hunting." *See Reis v. Miller*, 550 N.W.2d 78 (S.D. 1996), *State v. Tracy*, 539 N.W.2d 327 (S.D. 1995) (landowner appeals from hunter interference convictions).

C. South Dakota's Notice Of Lawfulness Combined With The Resulting Physical Invasions Is A *Per Se* Taking Of The Bensons' Property.

Were the State's "mere decriminalization" contrivance true and not a mere *post hoc* rationale for the benefit of the proceedings below, it would have created conflict and

confusion between the provisions of S.D. Codified Laws §§ 22-18-4 and 41-1-8 and left hunters unsure of their rights and remedies, or ripe for potential conflict and injury, or both. This was also recognized by the trial court. App. 98. That is not what the State Legislature intended with its passage of HB 1163, what the State demonstrated with the publication of its Hunting Handbook, or what the South Dakota Attorney General's office stated in the days and months following the Legislature's action.

From the outset and in multiple ways, South Dakota put the hunting public on notice that shooting onto private property was fully lawful. Even prior to passage of the legislation in question, South Dakota put the Bensons on notice that interfering with members of the hunting public who were shooting onto their private property would make the Bensons subject to criminal sanctions. Even if South Dakota were allowed to invent an *ex post facto* decriminalization defense that the State Supreme Court later embraced, the Bensons suffered a taking of their property between the time South Dakota provided unambiguous notice of the lawfulness of the act authorized by the Legislature and the State Supreme Court's conclusion that the Legislature had merely "decriminalized" those acts. As stated above, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English* at 321.

Insofar as the South Dakota Supreme Court failed to hold that the State effectuated a taking, at the very least between such time it noticed the public of the lawfulness of invasion by hunters and its later adoption of its *post hoc* mere "decriminalization" defense, this Court should grant review of the decision of the South Dakota Supreme Court.

III. AN AFTER-THE-FACT CIVIL REMEDY IS NOT A CONSTITUTIONALLY VIABLE SUBSTITUTE FOR THE RIGHT TO EXCLUDE AND THIS CASE WARRANTS REVIEW TO PREVENT THE "DE-CRIMINALIZATION" DEFENSE FROM ERODING THAT ESSENTIAL RIGHT.

Despite all logic and evidence to the contrary, even if, as held by the South Dakota Supreme Court, some right of action in civil trespass remains available to the landowner, "an after-the-fact civil trespass remedy is not a constitutionally acceptable substitute for the right to exclude others initially from private property." *See, e.g., Nolan and Nolan v. City of Eagan*, 673 N.W.2d 487 (Minn. App. 2003) (legal remedies are necessarily inadequate if a taking occurred); *Alcorn v. Edmonds County*, 241 N.W.2d 323 (S.D. 1932) (S.D. Const. art. VI, § 13, "vests in an owner of property the right to prevent the taking or damaging of property until compensation is paid."). *See also* S.D. Codified Laws § 43-2-1 (private ownership of property includes right to "use it to the exclusion of others").[6]

Even if the South Dakota Supreme Court decision is given its most favorable interpretation, South Dakota's actions remain constitutionally infirm. As property owners, the Bensons have no before-the-fact remedy to prevent an armed hunter who is lawfully standing within the public right-of-way from firing a weapon onto their property. Approaching that hunter prior to the firing of the hunter's weapon is criminally actionable under South Dakota's hunter harassment statute. Only after such time

---

[6] 43-2-1. Ownership defined

The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others.

as the hunter has fired projectiles onto their land is some future civil trespass remedy available to the Bensons.

The impossibility of exercising that most fundamental right to exclude as described repeatedly in this Court's cases[7] dictates that an after-the-fact civil remedy is constitutionally inadequate. Even according to at least one Member of the South Dakota Legislature, the right to exclude under the current status of law is illusory:

> It's a joke ladies and gentlemen if you think that the state can take care of the trespass law. If you have ever had a person trespass on your place and try to get somebody to arrest them and prosecute, it's almost impossible in this state. Now, we want to give them the right to trespass with a gun, shoot, do anything that they wish to do, and where does our landowners rights come in?

App. 126.

Moreover, Justice Kokenkamp, in his concurrence, stated that leaving only an after-the-fact civil remedy:

> [R]easons that private property can be opened to public use through the expedient of "decriminalizing" the very laws that protect private property. This ignores an essential function of our constitutional form of government. James Madison, the author of the private property clause in the Fifth Amendment, wrote, "A Government is instituted to protect property of every sort . . . This being the end of government, that alone is just government,

---

[7] For example, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), this Court held that "the right to exclude is one of the most essential sticks in the bundle of rights that are commonly characterized as property."

> which impartially secures to every man, whatever is his own." Ralph Ketcham, *James Madison: A Biography,* 330 (Univ. of Virginia Press 1990).

Benson, 710 N.W.2d at 164; App. 58.

And, in her dissent, Justice Meierhenry wrote:

> Just as intermittent flooding may be a taking, so may the seasonal appropriation of [the Bensons'] property by the State in a manner which completely deprives them of their right to exclude. The effect of [S.D. Codified Laws §] 41-9-1.1(2) is to require [the Bensons], year after year, to submit the use of their land to the State, which appropriates the benefit of the property to the public under terms the State establishes. Because of the statutory provision, [the Bensons] are permanently deprived of a fundamental property right – the right to exclude. An after-the-fact civil suit cannot suffice where the State's action "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."

Id. at 168; App. 66 (citing *Loretto,* 458 U.S. at 435).

Moreover, no legitimate purpose may be said to exist for shifting the burden of trespass enforcement upon landowners to make land more freely available to road hunters. In fact, as this Court has held, the Fifth Amendment taking guarantee prohibits government from "forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 44 (1960). "The great end for which men entered into society, was to secure their property." *United States v. James Daniel Good*

Real Property, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part and dissenting in part) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765)).

A dominant theme of the Declaration of Independence is that individual rights pre-exist governments and governments are created for the purpose of securing these pre-existing rights.[8] So, too, are these principles reflected in the South Dakota Constitution.[9] Should this Court neglect to review the decision of the South Dakota Supreme Court, it would make for a curious day in South Dakota history as such a decision would constitute a complete "turning on its ear" of governmental purpose and authority. The Bensons contend that the South Dakota Supreme Court must not be allowed to sanctify a governmental action that transfers private property from the legitimate owner to the politically connected without providing just compensation but also refuses even to acknowledge that it has done so.

Moreover, even if, *arguendo*, the South Dakota Legislature intended to leave the Bensons with nothing more than a civil cause of action in trespass, it did so at the risk

---

[8] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." The Declaration of Independence, ¶ 2 (U.S. 1776).

[9] S.D. Const. art. VI, § 1. ("All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, or acquiring and protecting property and the pursuit of happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.")

of creating a climate of self-help inconsistent with all but the most extreme view of what constitutes sound public policy and the most fundamental role of government. Obvious conflicts and potentially serious injury or death could ensue when property owners confront armed "civil trespassers" and assert responsibility over that for which the State taxes its citizens, yet does not provide – the physical expulsion of trespassers from private property.[10] The so-called police power will then have become only an excuse through which to redistribute political favors rather than a means to thwart armed invaders, to protect property rights, and to obviate the need for self-help that will lead to bloodshed.

CONCLUSION

For all the aforementioned reasons, this petition for a writ of certiorari should be granted.

Submitted April 24, 2006.

Respectfully submitted,

JOSEPH F. BECKER*
**Counsel of Record*
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioners

[10] CNN.Com, *Five Hunters Killed In Wisconsin Woods* (November 22, 2004); http://www.cnn.com/2004/US/11/22/hunters.slain/. (The nation was shocked by the tragic results when some Wisconsin landowners attempted to enforce their property rights against a Minnesota hunter and trespasser.)

TABLE OF CONTENTS

Page

Decision, *Benson v. State of South Dakota,* No. 23492 (S.D. Jan. 24, 2006).....App. 1

Notice of Stay, *Benson v. State of South Dakota,* Civ. 03-121 (6th Jud. Cir. Dec. 28, 2004).....App. 69

Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment, *Benson v. State of South Dakota*, Civ. 03-121 (6th Jud. Cir. Dec. 17, 2004).....App. 71

Memorandum Decision, *Benson v. State of South Dakota,* Civ. 03-121 (6th Jud. Cir. Nov. 30, 2004)....App. 75

U.S. Const. amend. V .....App. 103

U.S. Const. amend. XIV, § 1 .....App. 103

S.D. Const. art. VI, § 13 .....App. 104

S.D. Codified Laws § 15-26A-38. Stay of execution without bond by public agency or officer .....App. 105

S.D. Codified Laws § 41-1-8. Interference with lawful hunting, trapping, or fishing prohibited – Violation as misdemeanor .....App. 105

S.D. Codified Laws § 41-9-1.1. Highways and public rights-of-way excepted from restrictions – Required distance from livestock or buildings for hunting or trapping – Violation as misdemeanor – Revocation of hunting privileges.....App. 106

TABLE OF CONTENTS – Continued

Page

Excerpts, 2003 South Dakota Hunting Handbook, obtained on March 25, 2004, from website of South Dakota Department of Game, Fish & Parks, www.dgfp.info/Publications/HuntingHandbook.pdf ....App. 108

Legislative history, South Dakota House Bill 1163, House of Representatives, February 22, 2003 (certified transcription); available at http://lightning.state.sd.us:8080/ramgen/78session/hou28hb1163a.rm ....App. 115

Legislative history, South Dakota House Bill 1163, Senate, March 3, 2003 (certified transcription); available at http://lightning.state.sd.us:8080/ramgen/78session/sen34hb1163a.rm .....App. 136

Memorandum from Charles D. McGuigan, Assistant Attorney General, State of South Dakota, to All Interested Persons, April 8, 2003; available at http://www.state.sd.us/attorney/office/publications/pdf/2003legislationmemo.pdf (last visited April 17, 2006) .....App. 165

2006 SD 8

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

ROBERT BENSON, JUDITH BENSON, JEFF MESSMER, and TRICIA MESSMER, Plaintiffs and Appellees,

v.

STATE OF SOUTH DAKOTA, M. MICHAEL ROUNDS, in his official capacity as Governor of the State of South Dakota; LARRY LONG, in his official capacity as Attorney General of the State of South Dakota; SOUTH DAKOTA DEPARTMENT OF GAME, FISH & PARKS; and JOHN COOPER, in his official capacity as Secretary of the South Dakota Department of Game, Fish & Parks, Defendants and Appellants.

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE SIXTH JUDICIAL CIRCUIT
TRIPP COUNTY, SOUTH DAKOTA

* * * *

HONORABLE KATHLEEN F. TRANDAHL
Judge

* * * *

ARGUED ON AUGUST 31, 2005

OPINION FILED **01/24/06**

* * * *

CHRISTOPHER D. DOHRER
of Richardson, Wyly, Wise,
Sauck & Hieb. LLP
Aberdeen, South Dakota

J. SCOTT DETAMORE
JOSEPH F. BECKER
WILLIAM PERRY PENDLEY
Mountain States Legal
Foundation
Lakewood, Colorado

Attorneys for plaintiffs and appellees.

LAWRENCE E. LONG
Attorney General

CRAIG M. EICHSTADT
ROBERT E. MAYER
Deputy Attorneys General
Pierre, South Dakota

Attorneys for defendants and appellants.

[¶1.] MEIERHENRY, Justice and GILBERTSON, Chief Justice

[¶2.] **Justice Judith K. Meierhenry delivers the opinion of the Court on Issue 1, which holds that the circuit court had jurisdiction to consider this action.**

[¶3.] **Justice Judith K. Meierhenry delivers the opinion of the Court on Issue 2, which holds that Landowners have standing to challenge the statute at issue.**

[¶4.] **Chief Justice David Gilbertson delivers the opinion of the Court on Issue 3, which holds that the challenged statute does not constitute a compensable taking under the United States Constitution or the South Dakota Constitution.**

[¶5.] **MEIERHENRY, Justice, writing for the Court on Issues 1 and 2.**

[¶6.] Landowners, Robert and Judith Benson and Jeff and Patricia Messmer (hereinafter Landowners), brought this action seeking declaratory and injunctive relief against the State of South Dakota, a state agency, and certain state officials. Landowners challenge the constitutionality of SDCL 41-9-1.1(2), which addresses the shooting of small game from a public right-of-way. The circuit court found that SDCL 41-9-1.1(2) constitutes a taking of private property without just compensation in violation of the United States and South Dakota Constitutions. On appeal, the State contests that decision. The State also asserts that the circuit court lacked jurisdiction to grant a declaratory judgment and that Landowners lacked standing to challenge SDCL 41-9-1.1(2). Through separate opinions, we hold that the circuit court had jurisdiction to grant a declaratory judgment and that Landowners had standing, however we hold that SDCL 41-9-1.1(2) is not a taking within the meaning of the Fifth Amendment of the United States Constitution and article VI, section 13 of the South Dakota Constitution. Affirmed in part and reversed in part.

FACTUAL AND PROCEDURAL BACKGROUND

[¶7.] The Bensons reside on and operate a ranch in Tripp County, South Dakota. The ranch operates primarily for

agricultural purposes, which include the raising of livestock and a variety of crops. The Messmers reside on and operate a farm in Jerauld County, South Dakota. The Messmer farm is a cattle and grain operation. Both the Bensons and the Messmers also operate private hunting lodges and maintain private hunting preserves on their properties. The Benson ranch includes a parcel cultivated exclusively for pheasant habitat.

[¶8.] South Dakota law requires hunters to obtain the permission of property owners before hunting on private property. SDCL 41-9-1. The permission requirement, however, does not apply to highways or other public rights-of-way except for certain safety zones, that is, within six hundred sixty feet of an occupied dwelling, a church, a schoolhouse, or livestock. SDCL 41-9-1.1. In 2003, the South Dakota Legislature amended SDCL 41-9-1.1 by adding the following language:

> For purposes of this section, hunting on highways or other public rights-of-way includes:
>
> (1) The shooting at or taking by legal methods of small game, except mourning dove, that are located within the boundaries of the highway or public right-of-way;
>
> (2) The shooting at or taking by legal methods of small game, except mourning dove, that are in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way.

> If subdivision (2) of this section is declared by an advisory opinion or adjudication of the South Dakota Supreme Court to be a taking of private property requiring compensation, subdivision (2) is void.

SDCL 41-9-1.1.

[¶9.] Landowners contend that subsection two results in a taking of their property without just compensation in violation of article VI, section 13 of the South Dakota Constitution and the Fifth Amendment of the United States Constitution. They assert that SDCL 41-9-1.1(2) prevents them "from excluding members of the public from shooting onto their ranch or farmland while hunting in the public rights-of-way that border [their] properties." Several miles of public rights-of-way in the form of county and township roads bordering Landowners' properties are used by the public for road hunting. The roads that border the Bensons' pheasant preserve are particularly attractive to road hunters.

[¶10.] Landowners brought suit against the State of South Dakota and the South Dakota Department of Game, Fish, and Parks (GFP), as well as Governor M. Michael Rounds, Attorney General Larry Long, and GFP Secretary John Cooper in their official capacities (collectively State). In addition to claiming that SDCL 41-9-1.1(2) constitutes an unconstitutional taking, Landowners asserted that the state officials violated 42 USC § 1983 by depriving them of their constitutional rights under color of law. Landowners asked the circuit court to declare that SDCL 41-9-1.1(2) results in an unconstitutional taking of private property without just compensation. Landowners also sought injunctive relief preventing the State's enforcement of SDCL 41-9-1.1(2).

[¶11.] Because the case presented no genuine issues of material fact, Landowners and the State filed cross motions for summary judgment. The circuit court granted summary judgment in favor of Landowners. On appeal, the State raises the following issues:

ISSUES

1. Whether the circuit court had jurisdiction to grant a declaratory judgment against the State or officials of the State acting in their official capacities.

2. Whether Landowners lack standing to challenge criminal prohibitions under which they are not threatened.

3. Whether the circuit court erred when it held that SDCL 41-9-1.1(2) constitutes a taking of Landowners' property within the meaning of the Takings Clause of the Fifth Amendment of the United States Constitution and article VI, section 13 of the South Dakota Constitution.

DECISION

[¶12.] *1. Whether the circuit court had jurisdiction to grant a declaratory judgment against the State or officials of the State acting in their official capacities.*

[¶13.] The State asserts that the circuit court lacked jurisdiction to hear Landowners' declaratory judgment action against the State. Whether the circuit court had jurisdiction is a question of law to be reviewed *de novo.* Dakota Systems, Inc. v. Viken, 2005 SD 27, ¶7, 694 NW2d

23, 27. The State first asserts that the doctrine of sovereign immunity bars this suit. The State admits that under the *Ex parte Young* doctrine, the Court may hear an action alleging that state officials are acting unconstitutionally. *See* 209 US 123, 28 SCt 441, 52 LEd 714 (1908). The State, however, maintains that the state officials are taking no action and that they are merely "refusing to implement a criminal prohibition that no longer exists." The State argues that sovereign immunity bars a declaratory judgment action against the State or its officials. Further, even if such an action may be brought, the State argues it does not present a justiciable controversy.

[¶14.] In light of settled precedent, we find no merit to the State's argument. We have recognized that the right to just compensation "is a right of the strongest character" and is "a self-executing constitutional provision." SDDS, Inc. v. State, 2002 SD 90, ¶22, 650 NW2d 1, 9. As such, "the remedy does not depend on statutory facilitation." *Id.* Therefore, common law actions may be brought against the State and its officers even though no express consent has been given. *See* Darnall v. State, 79 SD 59, 108 NW2d 201 (1961) (allowing an action under article VI, section 13 of the South Dakota Constitution against the state, the governor, and members of the state highway commission). As we stated in *Darnall*,

> Where a state or an agency thereof acting in a sovereign capacity takes or damages private property for public use without exercising the power of eminent domain, it cannot evade the constitutional provision which guarantees the right to compensation but will be obligated to pay the same as if it had proceeded under that power. The constitution should bind officers and agents of the state and the state should not by indirect

> action be permitted to violate it. It expects and demands compliance by its citizens and they have the correlative right to expect that from the state.

79 SD at 65-66, 108 NW2d at 204 (citations omitted).

[¶15.] Additionally, we recognized in *SDDS, Inc.*, that "South Dakota's sovereign immunity is not a bar to [a] Fifth Amendment takings claim." 2002 SD 90, ¶20, 650 NW2d at 8-9. "'[T]he constitutional privilege of a state to assert its sovereign immunity in its own courts does not confer upon a state a concomitant right to disregard the [United States] Constitution,'" and "'[t]he states and their officers are bound by obligations imposed by the Constitution.'" *Id.* (quoting Alden v. Maine, 527 US 706, 754, 119 SCt 2240, 2266, 144 LEd2d 636 (1999)). We have also recognized that a declaratory judgment action is a proper method of bringing a constitutional question before the court. Dan Nelson, Auto., Inc. v. Viken, 2005 SD 109, ¶30, 706 NW2d 239, 251 (finding "rather novel" the notion that "states are generally immune from suits for declaratory relief"); *Dakota Systems, Inc.*, 2005 SD 27, ¶9, 694 NW2d at 28 (finding that sovereign immunity does not bar a declaratory judgment action against a state official); *see also Ex parte Young*, 209 US 123, 28 SCt 441, 52 LEd 714; White Eagle Oil & Refining Co. v. Gunderson, 48 SD 608, 205 NW 614 (1925) (applying the *Ex parte Young* doctrine).

[¶16.] Finally, we reject the State's claim that no justiciable controversy has been presented. Under the Declaratory Judgments Act, any person whose rights are affected by a statute may obtain a declaration of rights. SDCL 21-24-3. We have said that in order for a court to have jurisdiction over a declaratory judgment action, there must be "'a justiciable controversy; that is to say, a controversy in

which a claim of right is asserted against one who has an interest in contesting it.'" Danforth v. City of Yankton, 71 SD 406, 412, 25 NW2d 50, 53 (1946) (citation omitted). Landowners, as property owners, have a claim of right to their property. Thus, their allegation that the State's actions result in an unconstitutional taking is sufficient to present a justiciable controversy. Landowners have properly challenged the constitutionality of SDCL 41-9-1.1(2) by proceeding against the State and its officials in this declaratory action.

[¶17.] **GILBERTSON, Chief Justice, KONENKAMP, ZINTER, Justices, and JOHNSON, Circuit Judge, concur.**

[¶18.] *2. Whether Landowners lack standing to challenge criminal prohibitions under which they are not threatened.*

[¶19.] The State claims that Landowners lack standing to challenge the constitutionality of SDCL 41-9-1.1(2). "The question of whether a party has standing to maintain an action is a question of law reviewable by this Court *de novo*." Frizmeier v. Krause Gentle Corp., 2003 SD 112, ¶10, 669 NW2d 699, 702. According to the State, Landowners lack standing for three reasons. First, Landowners have not been threatened with prosecution under SDCL 41-9-1.1(2), and they "have no standing to challenge a failure to prosecute someone else." Second, Landowners "lack authority to demand that certain acts remain criminal after the Legislature has repealed their prohibition." Third, the circuit court "lacks the authority to adopt a criminal prohibition where it has been repealed by the [L]egislature."

[¶20.] In response, Landowners argue that the State mischaracterizes their claims. They "neither 'challenge a criminal prohibition under which they are not threatened' nor 'judicially assert that certain activity must be [made] criminal.'" We agree with Landowners. Landowners do not assert that SDCL 41-9-1.1(2) accomplishes a taking of their property by decriminalizing an act. In their complaint, Landowners allege that:

> 44. Section 41-9-1.1(2) denies [Landowners] the right to prevent others from shooting onto their property. Section 41-9-1.1(2) denies [Landowners] the right to exclude others from recreating on their property, as well as the right to prevent the projection and disposition of objects onto their property.
>
> 45. Section 41-9-1.1(2) denies [Landowners] valuable hunting and fishing rights appurtenant to and separable from their property as provided by [SDCL] 43-13-1.
>
> 46. Section 41-9-1.1(2) subjects [Landowners] and their families, employees, and guests to fear and risk of serious bodily injury or death and subjects [Landowners]' homes, structures, livestock, equipment, crops and land to injury and/or damage.
>
> 47. Section 41-9-1.1(2) impairs [Landowners]' full enjoyment and use of their property.

Thus, Landowners consistently argue that the statute subjects them to intrusions of their property. Landowners do not refer to "decriminalization," nor do they demand prosecution. Rather, the State asserts the decriminalization argument.

[¶21.] The State cannot change the nature of the claim in order to oust a court of jurisdiction. *See* Elliott v. Bd. of County Comm'rs, 2005 SD 92, ¶¶16-17, 703 NW2d 361, 368 (stating that "jurisdiction depends on the pleadings and the prayer for relief" and "'[t]he test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought'"). Here, Landowners seek relief in the form of a declaratory judgment to establish whether SDCL 41-9-1.1(2) is a taking. This request comports with the purpose of the Declaratory Judgments Act, which "is to 'declare rights, status, and other legal relations.'" Kneip v. Herseth, 87 SD 642, 647, 214 NW2d 93, 96 (1974) (citing SDCL 21-24-1). Further, Landowners' claim falls squarely within the philosophy of the Declaratory Judgments Act. *Id.* at 647-48. As we said in *Kneip v. Herseth*,

> The philosophy of the Declaratory Judgment Act establishes that through it the courts seek to enable parties to authoritatively settle their rights in advance of any invasion thereof. Within the bounds of the remedial act's command of a liberal construction and liberal administration is found its ultimate goal of allowing "the courts (to be) more serviceable to the people." The achievement of peace through the avoidance of predictable conflict permeates as the Act's main function.

Id. at 648 (citations omitted).

[¶22.] Standing to bring an action depends on an allegation by the litigant "'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" Parsons v. South Dakota Lottery Comm'n, 504 NW2d 593, 595 (SD 1993) (quoting Gladstone, Realtors, et al. v. Bellwood, 441 US 91, 99, 99

SCt 1601, 1608, 660 LEd2d 66 (1979)). The United States Supreme Court has stated that in order to establish standing, a litigant must show: (1) an injury in fact suffered by the plaintiff, (2) a causal connection between the plaintiff's injury and the conduct of which the plaintiff complains, and (3) the likelihood that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 US 555, 560-61, 112 SCt 2130, 2136, 119 LEd2d 351 (1992).

[¶23.] In this case, Landowners allege that SDCL 41-9-1.1(2) allows the invasion of their property. Such alleged invasion constitutes an actual or threatened injury to Landowners' legally protectible interest in their land. Further, their claimed injury is fairly traceable to SDCL 41-9-1.1(2). Finally, a finding that the alleged invasion is a governmental taking without compensation renders the statutory provision void. *See* SDCL 41-9-1.1. Thus, under the principles set forth by both this Court and the United States Supreme Court, Landowners have established standing to assert a claim that SDCL 41-9-1.1(2) constitutes a taking.[1]

---

[1] Despite the fact that both standing jurisprudence and the Declaratory Judgments Act allow Landowners to challenge SDCL 41-9-1.1(2), the State argues that under our decision in *Reis v. Miller,* Landowners lack standing to challenge the "decriminalization" of an act. 1996 SD 75, 550 NW2d 78. The State's reliance on *Reis* is misplaced. In *Reis,* the issue presented was not an unconstitutional taking of private property. *Id.* ¶¶7-9. Rather, the issue was the extent of the easement included in public rights-of-way. *Id.* Further, in *Reis* we declined to analyze the issue of standing as to an equal protection claim. *Id.* ¶24. We did, however, recognize that the landowner had standing to bring a declaratory judgment action, and we proceeded to review the case on that basis. *Id.* ¶24.

[¶24.] **GILBERTSON, Chief Justice, KONENKA MP, Justice, and JOHNSON, Circuit Judge, concur.**

[¶25.] **ZINTER, Justice, concurs specially.**

[¶26.] **JOHNSON, Circuit Court Judge, sitting for SABERS, Justice, disqualified.**

ZINTER, Justice (concurring specially).

[¶27.] I concur in the Court's opinion to the extent it suggests that Landowners *initially* had standing because they *alleged* SDCL 41-9-1.1(2) constituted a taking under the state and federal constitutions. I concur because, when standing is at issue in the early stages of litigation, "the focus is on the party seeking relief, not on the issues [presented, and] [w]e do not consider whether the party filing the challenge 'will ultimately be entitled to any relief but whether he has the legal right to seek judicial redress for his grievance.'" *Matter of* Baby Boy K., 1996 SD 33, ¶14, 546 NW2d 86, 90 (internal citations omitted).

[¶28.] However, I disagree with the Court's opinion to the extent it suggests that the causation element of standing was ultimately proven; *i.e.*, that Landowners' "injury is fairly traceable to SDCL 41-9-1.1(2)." *Supra* ¶23. Although Landowners may he presumed to have satisfied this causation element of standing at the outset of the litigation, the United States Supreme Court has clearly explained that Landowners also bore the burden of proving that causation element of standing throughout all stages

of the litigation. *Lujan,* 504 US at 561, 112 SCt at 2136, 119 LEd2d at 364 (citations omitted).[2]

[¶29.] Furthermore, Landowners bore the burden of proving the causation requirement of standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (citations omitted). Thus, the manner and degree of proof necessary for Landowners to sustain their standing burden changed from the outset when they *alleged* a takings claim to the final disposition when they were required to *prove* that claim:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra,* 497 US at 889, 110 SCt at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," FedRule CivProc 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported

---

[2] This Court has also recognized the causal connection element of standing. "[S]tanding is satisfied if the litigant can show 'that he personally has suffered some actual or threatened injury *as a result of* the putatively illegal conduct of the Defendant.'" Edgemont Sch. Dist. 23-1 v. South Dakota Dep't of Revenue, 1999 SD 48, ¶16, 593 NW2d 36, 40 (quoting Agar Sch. Dist. No. 58-1 v. McGee, 527 NW2d 282, 284 (SD 1995) (citing *Parsons,* 504 NW2d 593, 595 (quoting *Gladstone, Realtors,* 441 US at 99, 99 SCt at 1608, 60 LEd2d at 76))) (emphasis added).

> adequately by the evidence adduced at trial" *Gladstone, supra,* 441 US at 115, n31, 99 SCt at 1616, n31.

Lujan, 504 US at 561, 112 SCt at 2137, 119 LEd2d at 364-65. Therefore, the mere fact that Landowners may be presumed to have standing to plead and litigate their takings claim does not mean that they necessarily satisfied their burden of proving standing on the merits.

[¶30.] In this case, the causal connection element of standing is also a required element of Landowners' takings claim. *See supra* ¶22 (citing *Lujan,* 504 US at 560-61, 112 SCt at 2136, 119 LEd2d at 364), and *infra* ¶¶57-74, 83 (analyzing Landowners' takings claim). Consequently, in order to maintain standing and prove their takings claim on the merits, Landowners were required to prove causation between the claimed injury (invasion of their property) and the conduct of which they complain (legislation decriminalizing certain types of hunting on public rights-of-way).

[¶31.] Landowners' burden of proving this causal connection for standing is especially high in this case because they are challenging a regulation (or more properly, the non-regulation) of parties who are not before the Court; *i.e.*, private individuals who engage in hunting on public rights-of-way. Landowners' burden is especially high because, when an individual challenges the legality of government action or inaction, the extent of the burden of establishing the elements of standing will depend on whether the plaintiff is the object of the action or inaction. *Lujan,* 504 US at 561-62, 112 SCt at 2137, 119 LEd2d at 365. If the plaintiff is the object of the government's action or inaction, "there is ordinarily little question that the action or inaction has caused [the] injury, and that a

judgment preventing or requiring the action will redress it." *Id.* However, if the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,* much more is needed." *Id.* at 562.

> In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction – and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," . . . and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redress-ability of injury.

Id. (internal citations omitted). Therefore, in cases like this where the statutes at issue regulate the criminality of hunting by private individuals, rather than the conduct of plaintiff Landowners, "standing is not precluded, but it is ordinarily '*substantially more difficult*' to establish." *Id.* (emphasis added) (citations omitted).

[¶32.] In this case, Landowners failed to meet this difficult standing burden because, as the Court explains in Issue 3, the State's passage of SDCL 41-9-1.1(2) was not the legal cause of Landowners' injury. *See infra* ¶¶57-74, 83. SDCL 41-9-1.1(2) was not the legal cause of Landowners' injury because the statute is nothing more than the definitional part of a criminal regimen regulating hunting by private individuals. The criminal nature of the

regulation is undeniable. SDCL 41-9-1 makes it a Class 2 misdemeanor to hunt "upon any private land not his own or in his possession without permission from the owner or lessee of such land." And, SDCL 41-9-1.1(2), the statute Landowners challenge, simply defines the types of hunting on the rights-of-way that are and are not subject to the criminal proscription in SDCL 41-9-1. SDCL 41-9-1.1(2) provides in relevant part: "§ 41-9-1 [the criminal proscription] does not apply to . . . [t]he shooting at or taking by legal methods of small game . . . that are in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way."

[¶33.] The Court acknowledges the fact that this is a criminal statute but contends that the State has "mischaracterize[d]" Landowners' claim. *Supra* ¶20. I agree that the State cannot mischaracterize the nature of Landowners' claim to defeat standing at the pleading stage. However, at the same time, Landowners cannot ignore the legal effect of SDCL 41-9-1.1(2) in satisfying their burden of proof regarding standing on the merits. The legal effect of this statute is that it defines the type of conduct that subjects individual hunters to a criminal prosecution. But, Landowners "lack[] a judicially cognizable interest in the prosecution or non-prosecution of another." Linda R. S. v. Richard D., 410 US 614, 619, 93 SCt 1146, 1149, 35 LEd2d 536 (1973). Because Landowners lack a judicially cognizable interest in the prosecution or non-prosecution of the individual hunters, Landowners cannot establish the causal connection necessary to maintain standing in the merits stage of this litigation. *Id.* (concluding that "given the special status of criminal prosecutions in our system," a person has no standing to challenge the failure

to prosecute another even though that person may suffer an injury due to the failure to prosecute).

[¶34.] The Court recognizes the causal connection requirement of *Lujan* and concludes that Landowners' injury, the invasion of their property, is "fairly traceable" to this statute. *See supra* ¶¶22-23. However, the Court errs in this conclusion because it only cites a portion of the causation rule. The entire rule provides: "there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, *and not . . . th[e] result [of] the independent action of some third party not before the court.*'" *Lujan,* 504 US at 560, 112 SCt at 2136, 119 LEd2d at 354 (emphasis added) (citation omitted). If the entire causation rule is acknowledged and applied, it is evident that Landowners failed to prove standing. They failed to prove standing because their injury is only caused when third party hunters, who are not before the court, choose to shoot into Landowners' airspace.

[¶35.] Because the third-party hunters are the legal cause of Landowners' injury, Landowners have failed to meet their burden of proving standing on the merits.[3] Consequently, I decline to join that portion of the Court's opinion broadly stating that Landowners' injury was "fairly traceable" to the statute decriminalizing certain types of hunting in the rights-of-way.

[¶36.] **GILBERTSON, CHIEF JUSTICE, writing for the Court on Issue 3.**

---

[3] Although I would address Landowners' taking claim as a part of the standing issue, I fully concur in the Court's takings analysis in Issue 3.

[¶37.] *3. Whether the circuit court erred when it held SDCL 41-9-1.1(2) constitutes a taking of Landowners' property within the meaning of the Takings Clause of the Fifth Amendment of the United States Constitution, and article VI section 13 of the South Dakota Constitution*

[¶38.] Landowners brought this action seeking declaratory and injunctive relief against the State, GFP and certain state officials. Landowners challenge the constitutionality of SDCL 41-9-1.1(2), which decriminalizes the shooting of small game birds that have taken flight from or fly over a public right-of-way. The circuit court found SDCL 41-9-1.1(2) constitutes a taking without just compensation in violation of the Fifth Amendment of the United States Constitution and article VI, section 13 of the South Dakota Constitution. We reverse on Issue 3.

[¶39.] Statutory interpretation is an issue of law-to be reviewed *de novo*. Block v. Drake, 2004 SD 72, ¶8, 681 NW2d 460, 463 (citing Steinberg v. State Dept. of Military Affairs, 2000 SD 36, ¶6, 607 NW2d 596, 599). An appeal asserting an infringement of a constitutional right is also an issue of law to be reviewed under the *de novo* standard of review. State v. Dillon, 2001 SD 97, ¶12, 632 NW2d 37, 43 (citing State v. Stanga, 2000 SD 129, ¶8, 617 NW2d 486, 488). Under the *de novo* standard of review, we give no deference to the circuit court's conclusions of law. Sherburn v. Patterson Farms, Inc., 1999 SD 47, ¶4, 593 NW2d 414, 416 (citing City of Colton v. Schwebach, 1997 SD 4, ¶8, 557 NW2d 769, 771).

[¶40.] Challenges to the constitutionality of a statute face a significant and heavy burden. Meinders v. Weber, 2000 SD 2, ¶10, 604 NW2d 248, 254 (quoting Sedlacek v.

South Dakota Teener Baseball Program, 437 NW2d 866, 868 (SD 1989) (quoting Oien v. City of Sioux Falls, 393 NW2d 286, 289 (SD 1986))). There is a strong presumption that a statute is constitutional. State v. Asmussen, 2003 SD 102, ¶2, 668 NW2d 725, 728 (citing State v. Allison, 2000 SD 21, ¶5, 607 NW2d 1, 2). "In order to prevail, a successful challenge must refute this presumption beyond a reasonable doubt." *Id.* (citing State v. McGill, 536 NW2d 89, 94 (SD 1995)). "If a statute can be construed so as not to violate the constitution, that construction must be adopted." Wegleitner v. Sattler, 1998 SD 88, ¶4, 582 NW2d 688, 689 (quoting Cary v. City of Rapid City, 1997 SD 18, ¶10, 559 NW2d 891, 893 (citing Simpson v. Tobin, 367 NW2d 757, 766 (SD 1985))).

[¶41.] The Takings Clause of the Fifth Amendment provides in relevant part: "nor shall private property be taken for public use, without just compensation." US Const. amend V. It is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Lingle v. Chevron USA, Inc., ___ US ___, ___, 125 SCt 2074, 2080, 161 LEd2d 876 (2005) (citing Chicago, B. & Q. R. Co. v. Chicago, 166 US 226, 17 SCt 581, 41 LEd 979 (1897)). Article VI, section 13 of the South Dakota Constitution provides: "Private property shall not be taken for public use, or damaged,[4] without just compensation, which will

[4] The Landowners' claim is really about damage to real property, not an outright permanent taking. Article VI, section 13 of the South Dakota Constitution also provides compensation for damage to private property which is not permissible under the law. Originally this "damage" provision was not part of our proposed State Bill of Rights but rather the 1883 Constitutional Convention adopted the language of the Federal Constitution. *See* Constitution Convention of 1883, South Dakota Historical Collections, vol XXI, 342 (State Historical Society, 1942). However, the 1885 Constitutional Convention, after some

(Continued on following page)

be determined according to legal procedure established by the Legislature and according to § 6 of this article."

[¶42.] The issue of what constitutes a "public use" has been a subject of frequent litigation. Recently in *Kelo v. City of New London*, ___ US ___, 125 SCt 2655, 162 LEd2d 439 (2005), the United States Supreme Court concluded that a taking from one private party that will ultimately go to another private party complies with this standard as long as "it embraced . . . the broader and more natural interpretation of public use as 'public purpose.'" *Id.* at 2657. However, the Court recognized that the states were free "to impose 'public use' requirements that are stricter than the federal baseline." *Id.* at 2668. South Dakota has consistently done so. In its interpretation of article VI, section 13, this Court adopted the "use by the public test." Illinois Central R.R. Co. v. East Sioux Falls Quarry Co., 33 SD 63, 144 NW 724 (1913). This definition requires that there be a "use or right of use on the part of the public or some limited portion of it[.]" *Id.* at 77, 144 NW at 728. In that case, we did consider the alternate "public benefit" rule but opted for the "use by the public" rule. *Id.*

> The reasons which incline us to this view are, first, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use

---

debate, included the term "damage." Constitutional Debates of South Dakota, vol 1, at 292-299. This "damage" clause would ultimately be adopted by the 1889 Constitutional Convention and become part of our South Dakota Constitution. Constitutional Debates of South Dakota, vol 2 at 133. *See also* Richards v. Washington Terminal Co., 233 US 546, 554, 34 SCt 654, 657, 58 LEd 1088 (1914).

> in the earlier Constitutions; third, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application.

Id. at 78, 144 NW at 728. Thus, our state constitution provides its landowners more protection against a taking of their property than the United States Constitution. *Cf.* State v. Opperman, 247 NW2d 673, 674 (SD 1976) (citing Oregon v. Hass, 420 US 714, 95 SCt 1215, 43 LEd2d 570 (1975)) (holding that the South Dakota Supreme Court has the power to interpret our state constitution as providing an individual with greater protection than the Federal Constitution) (footnote omitted). The "use by the public" standard continues to be the law of this jurisdiction. *See* Great Northern Ry. Co. v. Chicago, St. P., M. & O. Ry. Co., 78 SD 168, 175-176, 99 NW2d 439, 443 (1959); Frawley Ranches, Inc. v. Lasher, 270 NW2d 366, 369 (SD 1978).

[¶43.] Examination of this constitutional issue cannot be conducted in a historical vacuum. In a concurrence in *Reis v. Miller,* 1996 SD 75, ¶¶28-31, 550 NW2d at 84-85, (Gilbertson, J., concurring), a portion of the history of South Dakota hunting laws was set forth:

> Historically, there is no support for the contention of the Plaintiffs that the Territorial Legislature in 1870, when accepting the rights-of-way easement from the Federal Government by enacting what is now SDCL 31-18-1, somehow intended to limit or preclude hunting from these ribbons of real estate. During the Territorial period, no limitations can be found on hunting anywhere although I presume that a landowner could maintain an action for trespass for entering on his land without his permission. *See* Clark

v. Bates, 1 Dakota 42, 46 NW2d 510 (1874), *aff'd*, 95 US 204, 24 LEd 471 (1877). However, acts committed within the section line were not held to be a trespass upon the adjoining landowner's real property. State v. Bonine, 41 SD 231, 170 NW 138 (1918). As to wild game specifically, it was not until 1899 that the South Dakota Legislature passed its first limitation on hunting anywhere in the State, by requiring the owners' permission to hunt on private land. *See* SDCL 41-9-1.

At common law, wild game was deemed to be the property of the sovereign or state and not of the private real property owner. State v. Pollock, 42 SD 360, 365, 175 NW 557, 558 (1919). Therein we stated:

> This power of the state is based largely on the circumstance that the property right to the wild game within its borders is vested in the people of the state in their sovereign capacity; and as an exercise of its police powers and to protect its property for the benefit of its citizens, it is not only the right, but it is the duty of the state to take such steps as shall preserve the game from the greed of hunters. . . . The right to kill the game is a boon or privilege granted either expressly or impliedly by the sovereign authority and is not a right inhering in any individual. . . .

42 SD at 365-66, 175 NW at 559 (quoting 12 RCL 685). This common law doctrine was reinforced in 1899 by the passage of what is now SDCL 41-1-2, which provides in part, that "any game bird, game animal, or game fish . . . shall always and

> under all circumstances be and remain the property of the state. . . . " Eighty-two years were to go by until the Legislature sought to limit hunting within certain rights-of-way simply because of that realty's status by the amendment of SDCL 41-9-1.1 to that effect. State v. Peters, 334 NW2d 217, 221 (SD 1983). Prior to that time, the only applicable statutory hunting restrictions in existence were those generally pertaining to hunting such as bag limits or for the protections of farm buildings, fields and schools. *See* SDC 1939, § 25.0427.

[¶44.] Although the law concerning hunting regulation upon private property rather than public rights-of-way has been evolving since the commencement of regulation in 1899, it is a fair summary that for the most part, it has been an evolution from no regulation commencing at statehood in 1889 to that of increasing regulation and criminal restrictions upon hunters to protect private landowners.[5] The challenged amendments to SDCL 41-9-1.1(2) are not consistent with that trend.

---

[5] The original regulation of 1899 criminalized the act of taking game from private lands if hunters "knowingly hunted on enclosed, occupied, or cultivated lands of another without the consent of the owner or tenant[.]" Rev SD Political Code § 3054 (1903) (codified as SDCL 41-9-1). The 1899 law was amended to provide for posting of private lands. SL 1909, ch 240, § 25. Under this law, a person could hunt almost anywhere unless the land was posted "NO HUNTING" in the English language in conspicuous places. To the extent that growing or standing grain fields were involved, permission was required from the landowner. *Id.* In 1919 the law was amended so as to provide that permission was required on all cultivated lands, not just grain fields. SL 1919, ch 216, § 10511. The law was again amended in 1925 so as to delete the requirement of cultivated lands. SL 1925, ch 175, § 10511. Posting was required for all lands as of 1925. *Id.* In 1929, the Legislature amended the statutes to require permission of the landowner if the

(Continued on following page)

[¶45.] SDCL 41-9-1.1(2) provides in relevant part:

> The shooting at or taking by legal methods of small game, except mourning dove, that are in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way.
>
> If subdivision (2) of this section is declared by an advisory opinion or adjudication of the South Dakota Supreme Court to be a taking of private property requiring compensation, subdivision (2) is void.

---

land was enclosed with a woven wire fence. SL 1929, ch 136, § 10511. SDCL 41-9-1 and 41-9-1.1 trace their roots to 1947 when the Legislature passed the following statute:

> Farm land protected. No person shall enter upon any land not his own or in his possession, which is fenced with woven wire, or land upon which there is farm livestock, or land upon which there is unharvested grain, or land which is within forty rods of occupied farm buildings or schoolhouse without permission from the owner or lessee of such nor shall any person enter upon any land or lands not his own or in his possession with intent to take or kill any bird or animal, after being notified by the owner or lessee not to do so. Such notice may be given orally or by posting written or printed notices to that effect in the English language not more than eighty rods apart, in conspicuous places around the land so protected. This section shall be printed on all hunting licenses.

SL 1947, ch 112, § 1.

This subject matter has obviously continued to be one of great concern for the Legislature as it has revisited this statute with amendments in 1949, 1951, 1953, 1955, 1964, 1967, 1968, 1972, 1973, 1981, 1988, 1992, 1996 and 2003. *See* SL 1949, ch 94; SL 1951, ch 121; SL 1953, ch 107; SL 1955, ch 83; SL 1964, ch 79; SL 1967, ch 86; SL 1968, ch 100; SL 1972, ch 225; SL 1973, ch 269, § 1-2; SL 1974, ch 278; SL 1981, ch 299, § 1; § 4; SL 1988, ch 337; SL 1991, ch 337, § 62; SL 1992, ch 293, § 13; SL 1996, ch 252, § 1; SL 2003, ch 225, § 1.

The object of SDCL 41-9-1.1(2) is to define what constitutes criminal versus non-criminal conduct when hunting on rights-of-way section lines or highways. SDCL 41-9-1.1(2) does not seek to impose a limitation on the conduct of landowners or on the use of their property. Therefore, we must analyze the facts as brought forth by the Landowners in order to determine if the actions of the hunters who act in compliance with SDCL 41-9-1.1(2) and the 2003 GFP Hunting Handbook result in a taking within the meaning of the Fifth Amendment Takings Clause and article VI, section 13 takings jurisprudence, as was concluded by the circuit court.[6]

---

[6] Landowners go to great lengths to characterize their claims as something other than an objection to the Legislature's decriminalization of this one aspect of "road hunting." However, the true nature of their claim is revealed by all parties' agreement (including the circuit court's decision) that SDCL 41-9-1.1(2) was enacted in response to *State v. Rumpca*, 2002 SD 124, 652 NW2d 795, a case upholding Rumpca's *criminal trespass conviction* for shooting from a right-of-way at a bird flying over private land. Despite the true nature of Landowners' claim, the merits of their takings claim must be addressed. However, outside of that, Landowners' arguments as to the decriminalization cannot be addressed due to their lack of standing. Landowners have no standing because the United States Supreme Court has made it unequivocally clear that even though a person may suffer injury from a lack of prosecution, given the "special status of criminal prosecutions in our system," that person has no standing to challenge the failure to prosecute any particular criminal offense. *Linda R.S.*, 410 US at 619, 93 SCt at 1149, 35 LEd2d 536. That is because "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id. See also* Leeke v. Timmerman, 454 US 83, 85-87, 102 SCt 69, 70-71, 70 LEd2d 65 (1982) (citing *Linda R.S.*, 410 US at 619, 93 SCt at 1149, 35 LEd2d 536) (prison inmates lacked standing to challenge actions of correctional facility officials who influenced prosecutor to oppose issuance of arrest warrant for correctional officers accused of unnecessarily beating inmates).

[¶46.] The purpose of the Takings Clause under the Fifth Amendment is not to prohibit all governmental takings or interference with private property, but rather to require compensation be paid by the government "in the event of otherwise proper interference amounting to a taking." *Lingle*, ___ US at ___, 125 SCt at 2080, 161 LEd2d 876 (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 US 304, 315, 107 SCt 2378, 2386, 96 LEd2d 250 (1987)). A plaintiff seeking redress against the government under a regulatory takings claim must proceed under one of four theories: plaintiff must allege either 1) a *per se* regulatory physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 102 SCt 3164, 73 LEd2d 868 (1982), "where government requires an owner to suffer a permanent physical invasion of her property"; 2) a *per se* total regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 SCt 2886, 120 LEd2d 798 (1992), that deprives an owner of "*all* economically beneficial uses of the property"; 3) a regulatory taking under *Penn Central Tranps.* [sic] *Co., v. City of New York*, 438 US 104, 98 SCt 2646, 57 LEd2d 631 (1978), when a temporary or partial taking is alleged; or 4) a land-use exaction violating the standards as set forth in *Nollan v. California Coastal Comm'n.*, 483 US 825, 107 SCt 3141, 97 LEd2d 677 (1987), and *Dolan v. City of Tigard*, 512 US 374, 114 SCt 2309, 129 LEd2d 304 (1994). *Lingle*, ___ US at ___, 125 SCt at 2081-82, 2086-87, 161 LEd2d 876.

[¶47.] Landowners argue a *per se* regulatory physical taking was effectuated by the passage of SDCL 41-9-1.1(2), as the conduct permitted under the statute and as described by the 2003 GFP Hunting Handbook has resulted in a permanent physical invasion of their property. In the

alternative, Landowners argue that if this Court finds no *per se* regulatory physical taking, there was a partial or temporary regulatory taking under *Penn Central* that unreasonably interfered with their distinct investment-backed expectations and background principles of South Dakota property law. The State contends that neither a *per se* regulatory physical taking nor a *Penn Central* regulatory taking has occurred, but rather the conduct in question has merely been decriminalized. Landowners do not argue a *per se* total regulatory taking under *Lucas*. Nor is the land-use exaction theory under *Nollan* and *Dolan* applicable to the instant case.

A. *Per Se Regulatory Physical Taking*

[¶48.] A permanent physical occupation or an appropriation by the government of private property is the most serious form of invasion into an owner's property interests, and constitutes a *per se* regulatory physical taking. *Loretto*, 458 US at 435, 102 SCt at 3175-76, 73 LEd2d 868. A *per se* physical occupation occurs when the placement of a "fixed structure on land or real property" is effected by the government or by a third party under the government's direction. *Id.* at 436-37, 102 SCt at 3176-77, 73 LEd2d 868.[7] A *per se* physical occupation may also occur when the airspace over land is invaded in such a manner as to prohibit the use of land for any purpose, thereby resulting in a complete loss to the landowner. United States v.

[7] The permanent physical occupation in *Loretto* consisted of the "direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." 458 US at 438, 102 SCt at 3177, 73 LEd2d 868.

Causby, 328 US 256, 261, 66 SCt 1062, 1065, 90 LEd2d 1206 (1946) (holding airplane flights passing over land "by reason of frequency and altitude of the flights" can constitute a permanent physical occupation and a compensable taking within the meaning of the Fifth Amendment). However, there is a "constitutional distinction between a permanent physical occupation and a temporary physical invasion." *Loretto*, 458 US at 434, 102 SCt at 3175, 73 LEd2d 868. The first effects a compensable taking within the meaning of the Fifth Amendment, but the second does not. *Id.* A physical occupation that is less than permanent, and amounts to no more than a temporary physical invasion does not constitute a classic *per se* regulatory physical taking within the meaning of *Loretto*. *Id.* (citing Prune-Yard Shopping Center v. Robins, 447 US 74, 100 SCt 2035, 64 LEd2d 741 (1980)).

[¶49.] Landowners cite to *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 US 327, 43 SCt 135, 67 LEd 287 (1922) (*Portsmouth II*), as support for their proposition that shots fired over private property constitute a permanent physical occupation and therefore a compensable taking. However, in that case the United States Supreme Court was called upon to determine if the facts as pleaded by the plaintiff were sufficient to withstand a demurrer, in present day terms a motion for judgment on the pleadings for failure to state a claim. *Id.* at 328, 43 SCt at 136, 67 LEd 287.

[¶50.] The facts as pleaded by the plaintiff in *Portsmouth II* and its companion cases included the mounting of a large battery of cannons "with the intention of firing them over the claimant's land and without the intent or ability

to fire them except over that land."[8] *Id.* at 329, 43 SCt at 136-37, 67 LEd 287. In addition, the government had erected a fire control station that the Court noted could be evidence of intent to continue firing the cannons at will across claimant's land. *Id.* The issue hinged, according to the Court's rationale, on whether the firing of the cannons had the result of depriving the owner of the profitable use of the land. *Id.* at 329, 43 SCt at 136, 67 LEd 287. The Supreme Court held that there were sufficient facts alleged by the claimant to reverse the lower court's holding on the demurrer. *Id.* at 330, 43 SCt at 137, 67 LEd 287. The Court noted, "[i]n our opinion the specific facts set forth would warrant a finding that a servitude has been imposed." *Id.* While dicta, the Court's comment was based on the specific facts of the case, including the fact that "the public has been frightened off the premises by the imminence of the" cannons thereby eliminating the value of the property as a summer resort, its main value to the owner.[9] *Id.* at 136, 43 SCt at 328, 67 LEd 287. However, the

---

[8] The United States government had planned to construct a twelve-gun heavy artillery or battery on the land in 1873. Peabody v. United States, 231 US 530, 536, 34 SCt 159, 159-60, 58 LEd 351 (1913). However, the battery eventually consisted of three ten-inch cannons and two three-inch rapid fire guns by the time *Peabody* was heard in 1913. *Id. See also* Portsmouth Harbor Land & Hotel Co. v. United States, 250 US 1, 39 SCt 399, 63 LEd 809 (1919) (*Portsmouth I*). By the time *Portsmouth II* was filed, the old cannons had been dismantled and the government had erected heavy cannons at the fort as part of the nation's World War I coastal defense system. *Portsmouth II*, 260 US at 335-36, 43 SCt at 139, 67 LEd 287 (Brandeis, J., dissenting).

[9] The Court found that the hotel on the property had previously been profitable, but was conducted at a loss in 1903 and 1904 after the installation of the cannons. *Peabody*, 231 US at 538, 34 SCt at 160, 58 LEd 351. "[S]ince 1904, it had been closed and the cottages had been rented only in part and at reduced rates." *Id.*

Supreme Court did not hold that such facts amounted to a taking, stating instead that the facts *might* support a finding of a taking, but that the issue was a question for the lower court to decide at trial. *Id.* at 330, 43 SCt at 137, 67 LEd 287.

[¶51.] In the instant case, there is no allegation that the firing of shot from a shotgun by hunters is threatened at any and all times, as the cannons fired by the government were in *Portsmouth II*. Nor have Landowners alleged a total deprivation of all potential profits due to the actions of the hunters who act in compliance with SDCL 41-9-1.1(2). The facts in the instant case are more analogous to the facts in *Peabody*, 231 US 530, 34 Set 159, 58 LEd 351, and *Portsmouth I*, 250 US 1, 39 SCt 399, 63 LEd 809, where the Supreme Court concluded the facts were insufficient to demonstrate a permanent physical occupation.[10]

---

[10] Landowners' reliance on *Citizens for a Safe Grant v. Lone Oak Sportmen's Club, Inc.*, 624 NW2d 796 (MinnApp 2001), and *State v. Wilkinson*, 724 So2d 614 (FlaDistCtApp 1998), is also misplaced. Landowners cite these cases as support for the proposition that shots fired over private property, while intermittent, constitute trespass or invasion of the Landowners' property interest and that such an invasion constitutes a taking within the meaning of *Loretto*. However, in *Citizens for a Safe Grant*, the court held that shots fired over plaintiffs' private property constituted "unlawful entry" by the defendant such that the circuit court did not err when it found the defendant committed the *tort of civil trespass*. 624 NW2d at 805. In *Wilkinson*, the appellate court upheld a criminal conviction for third-degree felony trespass as defined by statute. 724 So2d at 615. The defendant in that case fired a rifle over private property in an effort to illegally shoot and kill a deer, an offense defined by statute as *third-degree criminal trespass*. *Id.* Neither case stands for the proposition that intermittent shooting over private property is of such a magnitude and frequency as to work a taking within the meaning of *Loretto*.

[¶52.] In the instant case, the hunters who engage in the conduct described in SDCL 41-9-1.1(2) may do so without risking prosecution for a criminal offense, but only during the small game bird hunting season. Only those who meet the requirements of the appropriate license, and have purchased one, come within the scope of this provision. Hunting regulations further limit the hours of shooting activity. Moreover, the shooting is only decriminalized *if* a bird of the types specified in the statute takes flight from or over the right-of-way *and* the hunter is located within the right-of-way.[11] Given the number of limiting factors that must be present in order for the act of shooting to meet the safe harbor conditions precluding criminal prosecution as provided in SDCL 41-9-1.1(2), the activity as described can occur on an intermittent basis only

---

[11] SDCL 41-9-1.1(2) pertains only to small game, and specifically to small game that is able to take flight. SDCL 41-1-1(24) defines small game as:

> "Small game," anatidae, commonly known as swans, geese, brants, merganser, and river and sea ducks; the rallidae, commonly known as rails, coots, and gallinule; the limicolae, referring specifically to shore birds, plover, snipe, and woodcock; the gruidae, commonly known as sandhill crane; the columbidae, commonly known as the mourning dove; the gallinae, commonly known as grouse, prairie chickens, pheasants, partridges, and quail but does not include wild turkeys; cottontail rabbit; and fox, grey and red squirrel. The term includes facsimiles of small game used for law enforcement purposes[.]

SDCL 41-9-1.1(2) seems to apply to pheasants, grouse, partridge, quail and various waterfowl, but excludes mourning dove. http://www.sdgfp.info/Wildlife/hunting/Index.htm (last visited January 23, 2006). According to GFP, the hunting season for these small game birds runs for specified periods of time beginning the third Saturday in September until the fourth week of January, depending on the type of bird and for some types of birds depending on zone location. http://www.sdgfpinfo/Wildlife/hunting/Info/SGSeasons.htm (last visited January 23, 2006).

during the hunting season, and not at all during the other months of the year. Landowners themselves have indicated in their affidavits that the activity does not occur constantly throughout the hunting season. The conduct is therefore temporary in nature during the hunting season, or in the alternative, it is a criminal act outside the protection of the statute.

[¶53.] Next, Landowners attempt to characterize the shot left laying on their land as further evidence of a permanent occupation. However, the shot pellets that remain on the ground are not fixed structures placed on the land by the hunters or by the State, and therefore do not work a *per se* regulatory physical taking. *See Loretto*, 458 US at 430, 102 SCt at 3173, 73 LEd2d 868 (noting fixed physical structures such as "telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land"). Nor do Landowners establish the shot that may remain prohibits the use of their land for any purpose so as to work a complete loss of its value. Lacking more than intermittent and temporary invasions, or the placement of a fixed structure upon the land by the State, or a complete loss of value of the property to Landowners, there is no legal basis to support a conclusion of law that the State's act in passing SDCL 41-9-1.1(2) or the hunters' actions of firing shot worked a *per se* regulatory physical taking within the meaning of the Fifth Amendment of the United States Constitution and article VI, section 13 of the South Dakota Constitution.

B. Penn Central Regulatory Taking

[¶54.] The acts of the hunters result in temporary and intermitted [sic] physical invasions rather than a permanent occupation. Therefore, we must analyze the takings claim under the *Penn Central* regulatory analysis. *See Lingle*, ___ US at ___, 125 SCt at 2081-82, 161 LEd2d 876.

[¶55.] Under the United States Supreme Court's holding in *Penn Central*, three principal factors must be analyzed in order to determine whether a regulation goes so far as to effect a taking within the meaning of the Fifth Amendment. *Id.* at ___, 125 SCt at 2081-82, 161 LEd2d 876. First, "the character of the governmental action" must be evaluated, keeping in mind that a

> "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see e.g.*, United States v. Causby, 328 US 256, 66 SCt 1062, 90 LEd 1206 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 US at 124, 98 SCt at 2659, 57 LEd2d 651. Next, "the economic impact of the regulation on the claimant" must be examined. *Lingle*, ___ US at ___, 125 SCt at 2081-82, 161 LEd2d 876. Finally, the extent to which the regulation has interfered with "distinct investment-backed expectations" must be analyzed. *Id.* When examining the economic impact and interference with distinct investment-backed expectations, we must do so by examining the alleged interferences with rights in the property as whole. *Penn Central*, 438 US at 130-31, 98 SCt at 2662, 161 LEd2d 876.

[¶56.] Not every destruction or injury to private property by governmental regulation will be a taking within the meaning of the Fifth Amendment. Omnia Commercial Co. v. United States, 261 US 502, 508-510, 43 SCt 437, 438, 67 LEd 773 (1923). "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 US 393, 415, 43 SCt 158, 159, 67 LEd 322 (1922). The difficulty lies in determining when damage to private property constitutes a compensable "taking," such that justice requires that the burden imposed on the private property owners by the regulation be spread among taxpayers through the payment of compensation.

1. Character of the Governmental Action

[¶57.] The character and nature of the state's action is critical in determining whether a taking has occurred. Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 US 470, 488, 107 SCt 1232, 1243, 94 LEd2d 472 (1987); (citing *Mahon*, 260 US 393, 43 SCt 158, 67 LEd 322). A distinction exists between the character of the government's actions in situations involving a permanent physical occupation of property and a more temporary invasion or government action outside the owner's property that causes consequential damages within. *Loretto*, 458 US at 428, 102 SCt at 3172, 73 LEd2d 868.

[¶58.] When a regulatory taking is alleged, the examination of the character of the government action includes a determination of whether that action resulted in direct, as opposed to an indirect or consequential, harm to the property. Hansen v. United States, 65 FedCl 76, 106

(FedCl2005) (citing Ridge Line, Inc. v. United States, 346 F3d 1346, 1355 (FedCir 2003) (citing *Portsmouth II*, 260 US 327, 43 SCt 135, 67 LEd 287)). The causation requirement in *Portsmouth II*, is often referred to as the "natural, probable consequence test." *Id.* (citing *Ridge Line*, 346 F3d at 1355). The test requires proof that the government action is the cause-in-fact of the harm for a taking to be cognizable. *Id.* (citing *Ridge Line*, 346 F3d at 1355).

[¶59] This cause-in-fact concept was examined in *Griggs v. County of Allegheny*, where homeowners were made physically ill and their home rendered uninhabitable by the noise and vibrations caused by the landings and takeoffs of airplanes at the Allegheny County airport. 369 US at 84, 87, 82 SCt at 531, 533, 7 LEd2d 585. The airport flight path caused airplanes to travel within thirty to 300 feet over the residence on takeoffs, and between fifty-three and 153 feet during landings. *Id.* The county had constructed the airport in compliance with all regulations of the Civil Aeronautics Administration (CAA) that specified the length of airstrips and the clearance required for landings and takeoffs. *Id.* at 85, 82 SCt at 531, 7 LEd2d 585. The county argued that if a taking had occurred it was effected by the federal government through the CAA's regulations, as the airport was in compliance with those regulations. *Id.* at 89, 82 SCt at 533-34, 7 LEd2d 585. The Court held that the county could not shift the responsibility for the taking to the CAA, as the county had selected the site for the airport and had secured the required properties for the physical construction of runways. *Id.* The Court concluded that it was the actions of the county and not the regulations of the CAA that had worked the taking of an air easement over the homeowners' property. *Id.*

The Court noted:

> *The Federal Government takes nothing*; it is the local authority which decides to build an airport vel non, and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built.

Id. (emphasis added).

[¶60.] Similarly, in *Harms v. City of Sibley*, 702 NW2d 91 (Iowa 2005), the Iowa Supreme Court was called upon to determine if the City of Sibley's rezoning ordinance had worked a taking of private property within the meaning of the Fifth Amendment. In that case, the city rezoned property across the street from the Harms' home from "light industrial" to "heavy industrial" at the request of Joe's Ready Mix. *Id.* at 93. The operation of the cement plant then created intense noise, dust and traffic problems, as well as caused lights to be shone into the Harms' home at all hours of the night. *Id.* at 95. The undisputed facts of the case included that the president and major shareholder of Joe's Ready Mix oversaw all operations of the plant, including selecting the site and how and when the plant would be built and operated. *Id.* at 101. The court cited *Griggs*, 369 US 84, 82 SCt 531, 7 LEd2d 585, and *N. Transp. Co. of Ohio v. City of Chicago*, 99 US 635, 642, 25 LEd 336, 338 (1878), for what it termed the consequential damages rule. *Id.* at 100. The rule is the same as the "natural, probable consequence test," which provides that "in the exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional

provision." *Harms*, 702 NW2d at 100 (quoting *N. Transp. Co. of Ohio*, 99 US at 642, 25 LEd 336). The court noted that *Griggs* employed the same "natural, probable consequence test" used in *N. Transp. Co. of Ohio*, which requires that the government action be the cause-in-fact of the damage "as opposed to an indirect or consequential, appropriation or seizure of property." *Id.* (quoting *N. Transp. Co of Ohio*, 99 US 642, 25 LEd at 338) (citing Barbian v. Panagis, 694 F2d 476, 485-87 (7th Cir 1982); *Hansen*, 65 FedCl at 102-06)). The court held that the actions of Joe's Ready Mix resulted in the damage to the homeowners' property rights by creating a nuisance, and therefore there was no taking by the City of Sibley when it rezoned the property in question. *Id.* at 101. Instead, the homeowners were permitted to recover damages in nuisance from Joe's Ready Mix. *Id.*

[¶61.] While we have never had occasion to consider the "natural, probable consequence test" in the context of a regulatory takings claim, we are persuaded that the cause-in-fact of the harm must be examined when analyzing the nature or character of the government action that is alleged to have worked a taking. *See Hansen*, 65 FedCl at 102-106 (discussing the concept of consequential harm in tort law and its application in takings claims). In doing so, we must identify the specific harm to property incurred by Landowners, and whether the actions that caused the harm were those of the State or some other entity or person not under the direct authority or control of the State.

[¶62.] The damage complained of by Landowners is the intrusion of shot onto their land and over the airspace above their land, as directed by hunters who shoot game birds that have taken flight from the rights-of-way. Landowners argue

that the actions of the hunters have been caused by the enactment of SDCL 41-9-1.1(2).[12]

---

[12] SDCL 41-9-1.1, which defines the parameters of criminal trespass while road hunting, provides:

> Except for controlled access facilities as defined in § 31-8-1, interstate highways, unimproved section lines not commonly used as public rights-of-way, and highways within parks or recreation areas or within or adjoining public shooting areas or game refuges posted for restriction of an applicable use as hereinafter set forth by the Department of Game, Fish and Parks, § 41-9-1 does not apply to fishing, trapping, or hunting on highways or other public rights-of-way within this state that meet the requirements of § 41-9-1.3. For purposes of this section, hunting on highways or other public rights-of-way includes:
>
> (1) The shooting at or taking by legal methods of small game, except mourning dove, that are located within the boundaries of the highway or public right-of-way;
>
> (2) The shooting at or taking by legal methods of small game, except mourning dove, that are in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way.
>
> If subdivision (2) of this section is declared by an advisory opinion or adjudication of the South Dakota Supreme Court to be a taking of private property requiring compensation, subdivision (2) is void.
>
> No person, except the adjoining landowner or any person receiving written permission from the adjoining landowner, may use such highways or rights-of-way for the purposes of hunting defined in this title within a six hundred sixty-foot safety zone surrounding an occupied dwelling, a church, schoolhouse, or livestock. Neither the person discharging a firearm at small game nor the small game being shot at may be within the safety zone. No person, except the adjoining landowner or any person receiving written permission from the adjoining landowner, may use such highways or rights-of-way for the purpose of trapping within six hundred sixty feet of an occupied dwelling, church, or schoolhouse. A violation of this section is a Class 2 misdemeanor. If any person is convicted of knowingly discharging a firearm within six hundred sixty feet of any occupied dwelling, church, or schoolhouse

(Continued on following page)

The specific conduct complained of by Landowners in their affidavit includes the following:

> 17. We observed numerous hunters shooting onto our property from [public highways] throughout the four to five weeks [following the opening of hunting season].
>
> 18. This season, after the change in road hunting law implementing SDCL 41-9-1.1(2), the behavior of those hunting from the roads has been bolder and more aggressive.
>
> 19. We observed some hunters shooting at pheasants on or above our property that had not taken flight from or crossed the road.
>
> 20. We observed hunters shooting within the 660-foot safety zone provided by SDCL 41-9-1.1, including within 660 feet of our home, buildings, and cattle.
>
> 21. We observed hunters trespassing on our land and, when confronted, they ordered us off of our own property.

[¶63.] The "damage" to Landowners' property, that is the intrusion of shot onto their lands and shot left on their lands, is caused by the actions of hunters. However, the statute does not specifically encourage or mandate that road hunting be conducted in a manner that causes shots to be fired onto Landowners' property. The hunters at all times retain control over when, where and how they will

---

for which such distance has been clearly and accurately marked and posted, the court shall, in addition to any other penalty, revoke the person's hunting privileges for a period of one year from the date of conviction.

fire at game birds flying over the right-of-way. Any damage caused to private property by the actions of hunters cannot be attributed to the State. The State does not place the hunter in the right-of-way or pull the trigger. Instead, any damage to property is attributable only to the acts of the hunters themselves as was the case for Joe's Ready Mix in *Harms v. City of Sibley.* The holding in *Griggs* supports this proposition as it is the hunters, like the county of Alleghany, that took action in compliance with all pertinent regulations yet was the direct cause of any harm to Landowners' property. Thus, any harm complained of by Landowners was not legally caused by the legislative enactment, but rather by the particular conduct of the hunters.[13]

---

[13] The circuit court, however, accepted the Landowners' argument that the enactment of SDCL 41-9-1.1(2) was not merely a decriminalization of the act of firing onto private property while road hunting, but rather, based on the 2003 Hunting Handbook of the South Dakota GFP, constituted a compensable taking. In doing so, the circuit court was both legally and factually incorrect.

The 2003 Hunting Handbook is simply a guide to hunters published by GFP. It does not purport to enact law as it notes in its opening page, "The Hunting Handbook is a synopsis of South Dakota Codified Laws and Game and Fish and Parks rules." State of South Dakota, Hunting Handbook 5 (2003). What actually constitutes the law in this state is set forth in SDCL 1-1-23, which provides:

The will of the sovereign power is expressed:

(1) By the Constitution of the United States;

(2) By treaties made under the authority of the United States;

(3) By statutes enacted by the Congress of the United States;

(4) By the Constitution of this state;

(5) By statutes enacted by the Legislature;

(6) By statutes enacted by vote of the voters;

(7) By the ordinances of authorized subordinate bodies;

(Continued on following page)

[¶64.] Furthermore, while SDCL 41-9-1.1(2) decriminalizes the shooting at small game birds originating from or taking flight over a right-of-way, when read in conjunction with SDCL 41-9-8 and 41-9-9, landowners retain all civil remedies against hunters that physically enter and shoot over their land.[14] SDCL 41-9-1.1(2) describes the manner

---

(8) Rules of practice and procedure prescribed by courts or adopted by departments, commissions, boards, officers of the state, or its subdivisions pursuant to authority so to do.

SDCL 1-1-23 does not include such "synopses" or handbooks.

Factually the handbook section on "Hunting on Public Road Rights-of-Way" nowhere mentions that a hunter has the full legal right to fire over private property. State of South Dakota, Hunting Handbook 26 (2003). In fact at page forty, the handbook informs the landowner "How to Prosecute a Trespasser." *Id.* at 40. The phrase relied upon by the circuit court, "[t]o be lawfully taken from a public road right-of-way, the hunter must be within the right-of-way boundaries when shooting, and the game must originate from or be flying over the road right-of-way" is found in the section *dealing* with "Unarmed Retrieval" not "Road Hunting." *Id.* at 33. However, Landowners have not challenged the status of unarmed retrieval of birds shot over the right-of-way, which is the subject of that particular sentence.

Neither has the Legislature seen fit to delegate sole regulatory authority over section line highways to GFP. The construction, repair and maintenance of these roads are the responsibility of the board of township supervisors. SDCL 31-13-1. Relocation or vacation of a section-line highway is granted to the county commissioners or the board of supervisors of an organized township under appropriate circumstances. SDCL 31-18-3.

[14] In its amici brief, the South Dakota Wildlife Federation sets forth what it believed to be a catalogue of those civil remedies. It stated:

> Here, the Plaintiffs retain their right to bring an action in Ejectment, SDCL 21-3-6, the traditional method for redeeming property interests against interlopers. This action may be for damages as well as for recovery of title. Where force is used, a plaintiff in Ejectment may recover treble damages. SDCL 15-3-1. The common law action of Private Nuisance is available to protect Plaintiffs in their use and enjoyment of property. SDCL 21-10-1-3. Plaintiffs also retain the right to protect their property through

(Continued on following page)

in which game may be taken without violating the *criminal law* of the State of South Dakota and incurring prosecution for a Class 2 Misdemeanor. The enactment of SDCL 41-9-1.1(2) decriminalizes the conduct for which the defendant was convicted in *Rumpca*, 2002 SD 124, 652 NW2d 795. It does not, however, eliminate any civil remedies available to landowners when a hunter engages in conduct that amounts to a civil trespass.

[¶65.] This type of legislative action is not unprecedented. We have in many instances recognized that the Legislature has the statutory authority to decriminalize an act while retaining civil liability upon the person who commits the act. The writing of an insufficient funds check in South Dakota can lead to criminal prosecution under SDCL 22-41-1 and civil liability under SDCL 22-2-1. Yet, since 1973, the Legislature has seen fit to preclude criminal liability of the perpetrator in numerous instances: i.e., post-dated checks under SDCL 22-41-2.2, failure of victim to serve notice of dishonor upon writer of insufficient funds check per SDCL 22-41-3.1, and failure to prosecute within six months of notice of check's dishonor as required by SDCL 22-41-3.4. However, should the victim fail to comply with these analogous requirements that preclude a criminal prosecution, he or she still retains full civil remedies under SDCL 22-2-1.

Trespass both as a civil tort, and as a misdemeanor, SDCL 22-35-6. Injunction is available in appropriate cases. SDCL 21-5-1. In other words, *all* classical common law and statutory remedies for assertion of rights in private property remain intact. That being so, the essential element of all takings jurisprudence is lacking in this case – an action by government which deprives landowners of title.

Amicus Curiae South Dakota Wildlife Federation's Br. 3.

[¶66.] Another example is marital relations. South Dakota at one time made adultery a crime. *See* SDCL 22-22-17 and -18 (repealed by SL 1976, ch 158, § 22-8). These statutes were repealed in 1976. Yet, since 1877 we have also recognized a civil cause of action for alienation of affections. SDCL 20-9-7. In *Veeder v. Kennedy*, 1999 SD 23, 589 NW2d 610, we upheld the continued civil cause of action as its statutory basis was still in force despite the fact the criminal liability had long since been repealed.

[¶67.] The Legislature has also done the reverse. In the passage of SDCL 35-4-78, it made the sale of an alcoholic beverage to a person under the age of twenty-one a crime yet also stated there would be no civil liability against the seller for the same act. In *Wegleitner*, 1998 SD 88, 582 NW2d 688, we upheld this statutory distinction from dual constitutional attacks under the separation of powers and the open courts provision in article VI, section 20 of the South Dakota Constitution.

[¶68.] Here, SDCL 41-9-9 goes one step further in making sure it is understood that landowners retain their civil remedies by declaring:

> Any person who is engaged, *legally or illegally*, in hunting is liable for any injury or death to any person or damages to property caused by the hunter's negligent actions. The injured person or the owner of the property that has been damaged may recover civil damages. *Nothing herein shall abrogate any other provision of law.*

(emphasis added).

[¶69.] The Legislature has also retained criminal statutes that are relevant to this case. Bensons state that they have experienced shot hitting their home and nearby tin

shed. Messmers have observed hunters shooting around their home, buildings and cattle. Hunters who engage in such criminal conduct are not protected by SDCL 41-9-1.1(2). Such acts are still a violation of the criminal law under another portion of SDCL 41-9-1.1 that provides in relevant part:

> No person, except the adjoining landowner or any person receiving written permission from the adjoining landowner, may use such highways or rights-of-way for the purposes of hunting defined in this title within a six hundred sixty-foot safety zone surrounding an occupied dwelling, a church, schoolhouse or livestock. . . . A violation of this section is a Class 2 misdemeanor.

[¶70.] Next, we have been invited by the Landowners to focus on the perceived "purpose and effect" of SDCL 41-9-1.1(2). Landowners attempt to persuade this Court to focus on the actions of hunters and the records of legislative debates to show that the true purpose and intent of SDCL 41-9-1.1(2) is an expansion of the right-of-way easement created on section lines and public highways to include an easement for hunting on private lands.

[¶71.] As we have noted on many occasions:

> The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction,

> and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute. Moss v. Guttormson, 1996 SD 76, ¶10, 551 NW2d 14, 17 (citing U.S. West Communications, Inc. v. Public Util. Comm'n, 505 NW2d 115, 122-23 (SD1993)) (citations omitted).

Martinmaas v. Engelmann, 2000 SD 85, ¶49, 612 NW2d 600, 611.

[¶72.] In the instant case, we may not resort to these external resources to interpret the statute, as the words of SDCL 41-9-1.1(2) are "clear, certain and unambiguous." Again, we are reminded that legislative intent is determined from what the Legislature said, not what we think it said or others think it said. *Martinmaas*, 2000 SD 85 ¶49, 612 NW2d at 611.[15] To do otherwise is to engage in a

---

[15] Landowners cite two statements made during the floor debate of SDCL 41-9-1.1(2) for the proposition that it was intended to go beyond decriminalization and was in reality intended to strip landowners of any remedy for firing at game flying over their land. We have consistently held that statements of individual legislators are not persuasive to establish the intent of the Legislature for a particular statute. Cummings v. Mickelson, 495 NW2d 493, 499 n7 (SD 1993) (citing State v. Bushfield, 69 SD 172, 176, 8 NW 1, 3 (1943)). There are 105 legislators and there may be 105 different individual reasons they vote for or

(Continued on following page)

form of judicial legislating, a power that is not granted to us under the constitution and circumvents the role of the Legislature where that power rests. This we cannot and will not do.

[¶73.] Despite the lack of ambiguity within SDCL 41-9-1.1(2), Landowners next point to a theoretical situation that might result when landowners attempt to press civil charges against a hunter who fires onto their property at a game bird that has taken flight from the right-of-way. Landowners hypothesize that the hunter will be able to use SDCL 41-9-1.1(2) as a defense against a claim of civil trespass, as the conduct has been "legalized" by the statute. However, as noted above, the fact that an act is not a crime does not immunize it from civil liability. If this were so, an individual sued for alienation of affection under SDCL 20-9-7 could simply plead as a defense that adultery is no longer a criminal offense in South Dakota. While the statement that adultery is not a crime under South Dakota law is true, it does not preclude a spouse from suing a third party for alienation of affection. *See Veeder*, 1999 SD 23, 589 NW2d 610. The criminality of adultery is not determinative of the civil remedy when the rights of personal relation are infringed upon by the "enticement of a husband from his wife or of a parent from a child." *See* SDCL 20-9-7.

[¶74.] Similarly, the elements of the tort of civil trespass remain unaffected by SDCL 41-9-1.1(2), and require only that:

---

against a bill. Rather, our rule of construction is that the Legislature said what it meant and meant what it said from the text of the statute. *In re* Famous Brands, Inc., 347 NW2d 882, 885 (SD 1984).

> One who intentionally and without a consensual or other privilege
>
> (a) enters land in possession of another or any part thereof or causes a thing or third person so to do, or
>
> (b) remains thereon is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests.

Rumpca, 2002 SD 124, ¶10 n2, 652 NW2d at 798 (citing Restatement Second of Torts § 158). The language used to decriminalize the formerly proscribed conduct does not serve to create civil consent, a civil privilege, or a civil defense for game bird hunters during hunting season, or any other time of the year.

2. & 3. Economic Impact of Regulation on Claimants and Interference with Distinct Investment Backed Expectations

[¶75.] Under the second and third factors in *Penn Central*, Landowners advance only two specific complaints with regard to the adverse economic impact and interference with distinct investment-backed expectations they have incurred as a result of the passage of SDCL 41-9-1.1(2). According to the complaint, Landowners allege that "SDCL 41-9-1.1(2) denies them valuable hunting and fishing rights appurtenant to and separable from their property as provided by" SDCL 43-13-1 and 43-13-2.[16]

---

[16] SDCL 43-13-1 provides in relevant part:

> The following land burdens, or servitudes upon land, may be granted and held, though not attached to land:
>
> (1) The right to pasture, and of fishing and taking game[.]

(Continued on following page)

Messmers support the claim of adverse economic impact by stating: "Because road hunting, as recently redefined by SDCL 41-9-1.1(2), now includes the shooting of pheasants on or above our land, members of the public shoot onto our property at the expense of the quality of our private hunting business and the income we derive from that business."

[¶76.] However, it is critical to note, that per the provisions of SDCL 41-1-2,

> No person shall at any time or in any manner acquire any property in, or subject to his dominion or control, any game bird, game animal, or game fish, or any part thereof, but they shall always and under all circumstances be and remain the property of the state, except as provided by § 41-1-3.

Thus, the only manner in which a person may obtain personal property rights in a wild game bird, animal or fish, is by the lawful taking of the game in compliance with all pertinent hunting and fishing laws. SDCL 41-1-2. Landowners have no property rights in the game that takes refuge, or otherwise locates on their property, until such time as the landowners take the game in compliance with all pertinent hunting regulations. *Reis*, 1996 SD 75, ¶29, 550 NW2d at 84 (Gilbertson, J., concurring).

SDCL 43-13-2 provides in relevant part:

The following land burdens or servitudes upon land may be attached to other land as incidents or appurtenances, and are called easements:

(3) The right of taking game[.]

[¶77.] The United States Supreme Court has recognized "that government may execute laws or programs that adversely affect recognized economic values." *Penn Central*, 438 US at 124, 98 SCt at 2659, 57 LEd2d 631. A challenged government action that causes economic harm will not support a takings claim when the action does not interfere with "interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Id.* (citing United States v. Willow River Power Co., 324 US 499, 65 SCt 761, 89 LEd 1101 (1945) ("interest in high-water level of river for runoff for tailwaters to maintain power head is not property"); United States v. Chandler-Dunbar Water Power Co., 229 US 53, 33 SCt 667, 57 LEd 1063 (1913) ("no property interest can exist in navigable waters")) (citations omitted).

[¶78.] Landowners argue that SDCL 41-9-1.1(2) interferes with their right to grant servitudes and easements for hunting under SDCL 43-13-1. Landowners seem to suggest that the State should be held liable for any decrease in the value of such servitudes that accrues due to a decrease in the number of publicly owned game birds that happen to be located upon Landowners' property.

[¶79.] SDCL 41-9-1.1(2) does not limit the right of Landowners to grant such easements and servitudes. While SDCL 41-9-1.1(2) may affect the quantity of game that may be available within the State and particularly on public rights-of-way, the State has the undisputed right to regulate its wildlife as it is property of the State until lawfully taken by a hunter. *See* SDCL 41-1-2 and -3. The State is the custodian of wildlife, and allocates State resources to GFPs' efforts to manage game birds that are deemed of public value. SDCL 41-3-1. The State does not

guarantee the quantity and quality of game birds. Nor does it guarantee that those who hunt will actually take sufficient game to satisfy their pecuniary needs or their daily hunting limit. The State cannot be forced by the courts to manage its wildlife in a manner that guarantees sufficient game to maintain, augment or decrease the value of Landowners' servitudes or easements. A decrease in value of these servitudes and easements due to a decrease in the publicly owned game bird population in a particular locale is our free market system at work. The State is not a guarantor of property values.

[¶80.] In their complaint, Landowners Messmers state they own and operate a private hunting lodge and maintain private hunting grounds on their property. Messmers note they have devoted sixty-five acres of the 3,000 acres of land they farm exclusively to food plots and habitat for pheasants. Messmers also claim that the only income derived from these sixty-five acres of land comes from their private hunting business. Messmers acknowledge that many of their neighbors farm their land differently and do not devote land exclusively for pheasant habitat.

[¶81.] When examining the economic impact of the contested regulation and its alleged interference with distinct investment-backed expectations, the court must determine how and to what extent the acts in question have adversely impacted the economic value of the land. *Penn Central*, 438 US at 130-32, 98 SCt at 2662-63, 57 LEd2d 631. In doing so, the land is viewed as one complete parcel rather than dividing the "single parcel into discrete segments and attempt[ing] to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130-31, 98 SCt at 2662-63, 57 LEd2d 631. Viewed from this perspective, Landowners retain the full value of the

land whether it is devoted to pheasant habitat or conventional farming.

[¶82.] The enactment of SDCL 41-9-1.1(2) does not prohibit Landowners from devoting any portion of their land to pheasant habitat or other income producing venture. But as noted above, the State is not a guarantor of the game bird population in a particular locale. Therefore, a takings claim that relies on a decrease in profitability of a privately owned business due to the taking of publicly owned birds by road hunters must fail under this portion of the balancing analysis.

[¶83.] Finally, even if Landowners were able to establish economic losses or a bona fide injury to distinct investment-backed expectations, a taking by the State would still not have occurred. It is the actions of the hunters that would be the cause of losses, as it is the intrusion of shot onto Landowners' property and shot left on their lands, and not the legislative enactment of SDCL 41-9-1.1(2), that is the legal cause of any injury incurred by Landowners. *See supra* ¶¶61-63.[17]

Conclusion

[¶84.] An examination of the history of our hunting statutes in *Reis*, 1996 SD 75, ¶¶28-31, 550 NW2d at 84-85,

---

[17] Landowners' complaint does not allege a direct violation of the Privileges and Immunities Clause. However, any claim by Landowners that the State has deprived them of "rights, privileges or immunities secured by the Constitution and laws and [defendants] are liable therefore under 42 USC 1983," is a part of their central claim of an uncompensated taking. Because we hold no taking exists, all such subsidiary claims also fail.

(Gilbertson, J., concurring), shows that for a great part of our history there were no, or only limited, criminal restrictions upon hunting. If the passage of SDCL 41-9-1.1(2) constitutes a compensable taking, then the same legal situation existed from 1889 and for many years thereafter. During those decades there were no criminal penalties for firing at a pheasant that was flying over private land. Yet, one can search all the Constitutional Debates and our case law prior thereto and after 1889 and there is no hint or suggestion a taking was the state of the law. "[T]he Constitution was written and adopted in the light of the conditions and well known laws as they then existed. . . ." *Wegleitner*, 1998 SD 88, ¶31, 582 NW2d at 698 (citations omitted). Although the hunting statutes have been repeatedly revised and amended since 1899, the relevant portion of article VI, section 13 of our state constitution remains the same as it did when enacted in 1889.

[¶85.] Moreover, if these Landowners can successfully advance a takings claim here, any citizen or group thereof who can establish a monetary loss will be looking to the public treasury for compensation should the Legislature deem the cause of action not to be appropriate for criminal sanctions, let alone remove one. Such a rationale was rejected in *Wegleitner*. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Penn Central*, 438 US at 124, 98 SCt at 2659, 57 LEd2d 651 (quoting *Mahon*, 260 US at 413, 43 SCt at 159, 67 LEd at 322).

[¶86.] Reduced to its core, Landowners' argument is that the State faces two options: it must for the first time in its history be compelled by the constitution to declare an act to be in violation of a criminal law or in the alternative

pay Landowners for its refusal to do so. Landowners cite no case law to support this argument and we have been unable to find any court which has so held. This argument improperly attempts to shift the resolution of the issue from the legislative arena to that of this Court. While the Legislature certainly enjoys the legal authority to once again make this type of activity criminal in nature, there is nothing in our Constitution to compel it. To hold otherwise would be to rule that compensable takings have been ongoing since 1889, except for that short period of time when the Legislature chose to criminalize the conduct as described in SDCL 41-9-1.1(2).

> Although many members of the Constitutional convention were to become Legislators in the new State of South Dakota, the early State Legislatures felt no constitutional compulsion to strike down or even modify [the unlimited right to hunt]. Green [v. Siegel, Barnett, & Schutz], 1996 SD 146, ¶18, 557 NW2d [396,] 402.

Wegleitner, 1998 SD 88, ¶11 n3, 582 NW2d at 692.

[¶87.] Furthermore, any civil remedies that existed prior to the passage of SDCL 41-9-1.1(2) remain intact. In fact, Landowners cite to no legislative roll-back of any civil causes of action that have existed for the protection of their property rights. At all times immediately prior to, and after this Court's holding in *Rumpca*, 2002 SD 124, 652 NW2d 795, and the legislative reaction to it by the amendment of SDCL 41-9-1.1(2), landowners' civil remedies against hunters remained the same.

[¶88.] Were we to affirm the circuit court and conclude a compensable taking has occurred here, the question would then arise as to what property rights the State has

acquired by its inverse condemnation and compensation payments to the Landowners, for this "is ultimately a judicial question." *See Illinois Central R.R. Co.*, 33 SD at 77, 144 NW at 728 (quoting Hariston v. Danville & WR Co., 208 US 598, 28 SCt 331, 52 LEd 637 (1908)). Although SDCL 41-9-1.1(2) is explicitly restrictive, the constitution that mandates the compensation requirement for a taking also guarantees "public use" in exchange. Under the "use by the public" doctrine as set forth in *Illinois Central*, we would have to decide whether the public now has purchased and enjoys the right to enter and hunt in the affected realty, not just shoot over it. *See also Frawley Ranches*, 270 NW2d at 369. "The right-of-way is public if everyone who desires may lawfully use the right-of-way." *Id.* at 369. This is a theoretical question which need not be answered, as we hold there is no compensable taking to begin with under the facts of this case.

[¶89.] "While the wisdom of the current statutes may be justly debatable, there is nothing contained in [the constitution] to topple them." *Wegleitner*, 1998 SD 88, ¶35, 582 NW2d at 699. For the above reasons we reverse the holding of the circuit court on Issue 3.

[¶90.] **ZINTER, Justice, and JOHNSON, Circuit Judge, concur.**

[¶91.] **KONENKAMP, Justice, concurs in result.**

KONENKAMP, Justice (concurring in result).

[¶92.] Although I agree that there has been no actual taking of private property here, this case approaches the limits of regulatory encroachment. In amending its rules on road hunting, the Legislature struck a difficult balance between the interests of hunters and landowners, a

balance that falls within constitutional limits. Indeed, as the United States Supreme Court recognized, these questions have "proved to be a problem of considerable difficulty." *Penn Central*, 438 US 104, 123, 98 SCt 2646, 2659, 57 LEd2d 631. Here, the difficulty has been overcome by a careful balancing of equities. If hunters obey all existing laws governing road hunting, then the interference to landowners from shooting over private property at wild game in flight from or across a public road will be minimal.

[¶93.] Nonetheless, to say that there is no taking here because the State is only "decriminalizing" a certain hunting provision is to ignore the State's comprehensive regulatory system controlling every aspect of hunting. By making an exception to the general prohibition in SDCL 41-9-1 against hunting on private property without owner consent, the Legislature has itself effectively granted consent to hunters to shoot over private property as if it were in the public domain. No other conclusion can be gained from a plain reading of the statute. It provides in relevant part that lawful "hunting on highways or other public rights-of-way includes . . . (2) [t]he shooting at or taking by legal methods of small game, except mourning dove, that are in flight *over private land* if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way." SDCL 41-9-1.1(2) (emphasis added).

[¶94.] A contrary conclusion reached by the Court that the statute does not encourage shooting over private property is simply incorrect. Legislative consent now legitimizes the shooting at certain small game that are in flight a short distance within private property boundaries.

The fact that hunters must be licensed by the State and be hunting during the lawful season set by the State before they can shoot over private property only fortifies this conclusion. Saying that landowners still maintain their civil remedies and that they may protect themselves against trespass by suing road hunters cannot mollify the State's part in consenting to road hunting on private property.

[¶95.] Despite these concerns, however, the Legislature is entitled to balance the benefits and burdens here without being responsible for a taking under eminent domain. The huge benefit the State obtains through tourism and recreational hunting outweighs any transient and marginal interference to landed interests caused by road hunters who are otherwise obeying all state hunting laws.[18] As the United States Supreme Court, wrote, "'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' . . . and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Central*, 438 US at 124, 98 SCt at 2659, 57 LEd2d 631 (quoting *Mahon*, 260 US at 413, 43 SCt at 159, 67 LEd 322).

---

[18] An illustration of how little loss the Landowners can show here is evident in the examples of hunter violations they assert to support their claim. Many of the examples they offer, like firing near homes or livestock, shooting at birds that are not in flight from or across a road, and trespassing while armed, remain criminal violations of existing law.

[¶96.] I cannot agree with the Landowners' argument that they have suffered a permanent taking of their property to the extent of 900 feet on the other side of their fence lines. Compensating landowners for a permanent taking of their property is untenable because the State has not *permanently* occupied any property by its change in hunting laws. At worst, the interference here is episodic and seasonal. The thought of sending a state compensation check to a landowner each time some bird shot crosses a property line seems excessive. Any property damage that might be caused in general by shooting at birds in flight is speculative. The land suffers no diminution in value, and it retains all its legitimate economic productivity. *Penn Central*, 438 US at 124-25, 98 SCt at 2659, 57 LEd2d 631.

[¶97.] Nonetheless, what is worrisome about the Court's decision today is its rationale. It reasons that private property can be opened to public use through the expedient of "decriminalizing" the very laws that protect private property. This ignores an essential function of our constitutional form of government. James Madison, the author of the private property clause in the Fifth Amendment, wrote, "A Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." Ralph Ketcham, *James Madison: A Biography*, 330 (Univ of Virginia Press 1990).

[¶98.] We need not imagine too vigorously in order to capture the flaw in the Court's logic. What other offenses might be "decriminalized" to promote public use of private land? This "decriminalization" rationale is unnecessary to reach the conclusion that there is no taking of property here under our state and federal constitutions. We should go no further than to decide, under the Supreme Court's

well-established balancing of interests test, that shooting over private property at wild game in flight from or across a public road is a minimal intrusion and therefore is not compensable. *Penn Central*, 438 US at 136-37, 98 SCt at 2665-66, 57 LEd2d 631.

[¶99.] Finally, for those who might hold greater designs on private property for public recreational uses, they would do well not to be emboldened by today's ruling. The Court's rationale is questionable and not likely to withstand keener constitutional scrutiny in future cases.

[¶100.] Accordingly, I concur only in the result on Issue 3.

MEIERHENRY, Justice, dissenting on Issue 3.

[¶101.] I respectfully dissent from the majority's conclusion that SDCL 41-9-1.1(2) is not a taking for which just compensation is due. I agree with the circuit court's determination that this statutory provision results in a physical invasion of Landowners' properties. As the circuit court recognized, the "right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property."

[¶102.] My fundamental disagreement with the majority centers on the interpretation of the statute. I would conclude that the Legislature intended to extend the road hunting easement to include shooting at birds over private land. The extension of the easement took away Landowners' legal right to exclude road hunters from shooting over and entering certain portions of their property. Under this interpretation, the statute is a taking without just compensation.

[¶103.] Under the majority's interpretation, the Legislature's only intent was to decriminalize shooting at birds over private land. According to the majority, the Legislature left intact all of a property owner's legal rights to exclude others from entering or shooting over the land. This interpretation gives the amendment little if any meaning in regard to road hunting. It just means that criminal sanctions will not be imposed by GFP. It also means that the property owners have the absolute right to deny any entry upon their land. Consequently, the property owner may have actually gained an advantage. The culprits now are the road hunters who invade the land without permission. Conceivably the holding of the majority would also apply to the unarmed retrieval statute. The unarmed retrieval statute provides:

> Unarmed retrieval of lawfully taken small game from either private land or land controlled by the Department of Game, Fish and Parks or other public lands, *is not a crime or petty offense, if* the retrieval of the small game does not involve the use of a motor vehicle.

SDCL 41-9-8 (emphasis added). Since property owners retain all rights to exclude others from their land, they would also have the right to deny unarmed retrieval of birds legally shot from the roadway because, like SDCL 41-9-1.1(2), the unarmed retrieval statute "decriminalizes," rather than authorizes, retrieval.

[¶104.] There is no doubt that the days of private property owners giving strangers permission to hunt without charge have all but disappeared. Property owners, instead, have transformed hunting into an industry that serves to supplement their farm income. They have turned their farmland into commercial hunting preserves. Investment

in hunting preserves involves land and crop management specifically designed to complement game preservation and hunting rather than crop yield. Hunting preserve owners must obtain a state permit, pay an annual license fee, and abide by GFP regulations. SDCL 41-10-2; SDCL 41-10-4; *see generally* SDCL ch. 41. In addition, preserve owners must purchase and release large numbers of domestically raised birds to augment the native hatch. ARSD 41:09:01:02 (requiring preserves to release and maintain at least 600 male pheasants). The resulting abundance of birds in and around the preserves naturally attracts road hunters. Today's opinion, however, appears to diminish the range of road hunting since the road hunters have no right to shoot over private property or gain entry without the property owners' authorization.

[¶105.] Thus, unauthorized road hunters could face civil liability. The majority leaves open all civil remedies to the property owners' creativity and devices. Is this what the Legislature really intended by the amendment? Did the Legislature envision property owners clearly posting their land with warnings that any and all trespass is prohibited and that violators would be civilly liable? Was the expectation that hunters who shoot birds over private land could find themselves liable for damages, perhaps at least in amounts similar to or more than what they would have paid had they been paying guests? If so, GFP needs to update its hunting manual to alert road hunters of their potential civil liability whenever they breach private land and airspace by gunshot or physical entry.

[¶106.] I cannot agree that this is what the Legislature intended. It is more likely that the Legislature intended to expand the definition of road hunting to include shooting over "private land." The intent can be determined from the

plain and ordinary meaning of the language of the statute. The precise statutory language defines "hunting on highways or other public rights-of-way" as including:

> (1) The shooting at or taking by legal methods of small game, except mourning dove, that are located within the boundaries of the highway or public right-of-way;
>
> (2) *The shooting at or taking by legal methods* of small game, except mourning dove, *that are in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way.*

SDCL 41-9-1.1 (emphasis added). The statute authorizes members of the public who are hunting on public highways or rights-of-way to fire at birds that either fly up in rights-of-way or merely fly over rights-of-way, but continue in flight over private land. Thus, the meaning is clear.

[¶107.] But if there *is* some ambiguity, the circumstances surrounding the 2003 amendment of SDCL 41-9-1.1 support this interpretation. First, the change in the definition of "hunting on public rights-of-way" was intended to abrogate our decision in *State v. Rumpca* so as to allow the public to shoot birds over private property. *See* 2002 SD 124, 652 NW2d 795. Dissatisfied with the limits on road hunting enunciated in *Rumpca*, hunters and the organizations representing them turned to the Legislature with demands for more available public hunting. The State can – and does – establish publicly owned parcels of land on which its citizens may hunt. In comparison with other states, however, South Dakota maintains very little public hunting land. *See* Vincent Michael Roche, Road

Hunting Shot Down: Reflecting on the South Dakota Supreme Court's Decision in *State v. Rumpca*, 7 Great Plains Nat. Resources J. 31, 37 (2003). Instead of purchasing more public land to address the demand, the Legislature expanded the public easement to reach beyond the roadway, over the property line, and onto the individual property owner's land.

[¶108.] Although we have not traditionally relied on legislative floor debates in determining legislative intent, it is interesting to note that nowhere in the debates was the subject of decriminalization mentioned. *See* Debates Concerning HB 1163, 2003 Legislative Session, *available at* http://legis.state.sd.us/sessions/2003/1163.htm (last visited January 23, 2006). Further, if the Legislature intended to merely affirm the private property owners' right to exclude road hunters altogether, why did the Legislature provide for automatic repeal if the statute was found to be a taking? The automatic repeal provides: "If [SDCL 41-9-1.1(2)] is declared by an advisory opinion or adjudication of the South Dakota Supreme Court to be a taking of private property requiring compensation, subdivision (2) is void." SDCL 41-9-1.1. Based on the plain language as well as the background of the statute, I would conclude that the underlying intent of the statute was to expand the definition of road hunting to include shooting at birds that fly from the roadway onto private land, and that the State effectively enlarged the hunting easement to include the depth of shot over private property. The effect of the amendment takes away the property owners' right to exclude road hunters from invading their property and the airspace above it. Because of the amendment, the extent of the hunting easement is now the distance gunshot can travel from the roadway easement onto the land.

[¶109.] With this interpretation, the question then becomes whether the State's action of extending the hunting easement amounts to an unconstitutional taking without compensation. The first inquiry under a takings analysis is whether the action is a *per se* physical taking, that is, a permanent physical occupation or intrusion of property and the airspace above it. *Lingle*, ___ US at ___, 125 SCt at 2082, 2087, 161 LEd2d 876; *Causby*, 328 US at 264-65, 66 SCt at 1067-68, 90 LEd 1206 (recognizing that a property owner owns the airspace above the land and because continuous invasions of airspace "affect the use of the surface of the land itself," such invasions of airspace "are in the same category as invasions of the surface" and may also be a taking). The controlling principles governing such a *per se* physical taking were established by *Kaiser Aetna v. United States*, 444 US 164, 100 SCt 383, 62 LEd2d 332 (1979), and *Loretto*, 458 US 419, 102 SCt 3164, 73 LEd2d 868. *See Lingle*, ___ US at ___, 125 SCt at 2082, 2087, 161 LEd2d 876.

[¶110.] In *Kaiser Aetna*, the United States Supreme Court recognized that government cannot compel public access to private property without just compensation. *Id.* at 179-80, 100 SCt at 393, 62 LEd2d 332 (holding that government imposition of a navigational servitude on a marina created and rendered navigable at private expense required compensation). In doing so, the Court recognized that "the 'right to exclude,' so universally held to be a fundamental element of the property right," is an interest which "the Government cannot take without compensation." *Id.* at 179-80, 100 SCt at 393, 62 LEd2d 332. The Court again acknowledged that principle in *Loretto* when it defined "[p]roperty rights in a physical thing . . . as the rights 'to possess, use and dispose of it.'" 458 US at 435,

102 SCt at 3176, 73 LEd2d 868 (citation omitted). The Court further recognized that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.* In addition, "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." *Id.* at 432 n9, 102 SCt at 3174 n9, 73 LEd2d 868.

[¶111.] Likewise, a physical invasion of property may be a taking even if the government's dominion over private property is only partial or temporary in nature. As the Court of Appeals for the Federal Circuit has explained,

> [A] permanent occupation need not exclude the property owner to be compensable as a taking. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419, 436-38, 102 SCt 3164, 73 LEd2d 868 (1982) (holding that a compulsory installation of cables on apartment buildings pursuant to a state statute constituted a taking). Nor must the occupation be continuous. Thus, for purposes of takings analysis, "a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." Nollan v. Cal. Coastal Comm'n, 483 US 825, 831-32, 107 SCt 3141, 97 LEd2d 677 (1987).

Ridge Line, Inc., 346 F3d at 1352 (considering a claim that the federal government took a flowage easement by increasing runoff on the plaintiffs property and finding that circuit court erred in requiring proof that the plaintiff's property

was effectually destroyed or that it suffered a permanent and exclusive government occupation which destroyed its right to possession); *see also* United States v. Dickenson, 331 US 745, 67 SCt 1382, 91 LEd 1789 (1947) (affirming a lower court's finding that the federal government took an easement by inverse condemnation when its dam caused intermittent flooding).

[¶112.] In this case, SDCL 41-9-1.1(2) allows the State to exercise dominion and control over Landowners' property. Under that dominion, the State gives hunters a permanent and continuous right to invade Landowners' property during hunting season. Just as intermittent flooding may be a taking, so may the seasonal appropriation of Landowners' property by the State in a manner which completely deprives them of their right to exclude. The effect of SDCL 41-9-1.1(2) is to require Landowners, year after year, to submit the use of their land to the State, which appropriates the benefit of the property to the public under terms the State establishes. Because of the statutory provision, Landowners are permanently deprived of a fundamental property right – the right to exclude. An after-the-fact civil suit cannot suffice where the State's action "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, 458 US at 435, 102 SCt at 3176, 73 LEd2d 868.

[¶113.] Because SDCL 41-9-1.1(2) constitutes a *per se* physical taking, the regulatory takings analysis under the factors set forth in *Penn Central Transportation Co.*, 438 US 104, 98 SCt 2646, 57 LEd2d 631, does not apply. *See Lingle*, ___ US at ___, 125 SCt at 2082, 2087, 73 LEd2d 868. Here, the State is not "exercising its regulatory power in a manner that will cause an insubstantial devaluation

of [Landowners]' property." *Kaiser Aetna*, 444 US at 180, 100 SCt at 393, 62 LEd2d 332. Rather, SDCL 41-9-1.1(2) imposes a servitude, which "in this context will result in an actual physical invasion of the privately owned [land]." *Id.* As recently reiterated by the United States Supreme Court, a permanent physical invasion, however minor the economic cost, constitutes a *per se* taking because it "eviscerates the owner's right to exclude others from entering and using her property – perhaps the most fundamental of all property interests." *Lingle*, ___ US at ___, 125 SCt at 2082, 73 LEd2d 868. The amendment to SDCL 41-9-1.1 subjects property owners to continual invasions of their airspace and their property abutting public rights-of-way during hunting season, and it deprives them of a fundamental property interest: the right to exclude. The intrusion suffered by Landowners may be minimal, but that fact bears only on the appropriate amount of damages, a question of fact. *Loretto*, 458 US at 438, 102 SCt at 3177, 73 LEd2d 868 ("Once the fact of occupation is shown . . . a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due.").

[¶114.] The straightforward legislative scheme involves expanding the definition of road hunting to include shooting a bird over private property from a public right-of-way easement. The Legislature explicitly expanded the easement to include private property. When it did so, it demanded that Landowners subject a portion of their property for use by the public and took away their right to exclude. Such is constitutionally prohibited without compensation. Therefore, I would affirm the circuit court's holding that SDCL 41-9-1.1(2) is an unconstitutional

taking of private property without just compensation and thus void, as directed by the legislation.

[¶115.] Affirmed in part and reversed in part.

[¶116.] KONENKAMP, ZINTER, and JOHNSON, Circuit Judge, concur.

[¶117.] JOHNSON, Circuit Judge, sitting for SABERS, Justice, disqualified.

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA) Civ. 03-121
: SS
COUNTY OF TRIPP)

ROBERT BENSON, JUDITH BENSON, JEFF MESSMER, and TRICIA MESSMER,

Plaintiffs,

v. NOTICE OF STAY

STATE OF SOUTH DAKOTA; M. MICHAEL ROUNDS, in his official capacity as Governor of the State of South Dakota; LARRY LONG, in his official capacity as Attorney General of the State of South Dakota; SOUTH DAKOTA DEPARTMENT OF GAME, FISH & PARKS; and JOHN COOPER, in his official capacity as Secretary of the South Dakota Department of Game, Fish & Parks,

Defendants.

TO: ROBERT BENSON, JUDITH BENSON, JEFF MESSMER, TRICIA MESSMER, AND THEIR COUNSEL OF RECORD, CHRISTOPHER D. DOHRER, ATTORNEY AT LAW, P.O. BOX 1030, ABERDEEN, SOUTH DAKOTA 57401-1030 AND S. AMANDA KOEHLER, MOUNTAIN STATES LEGAL FOUNDATION, 2596 SOUTH LEWIS WAY, LAKEWOOD, COLORADO 80227.

Please take notice that the Defendants have filed their Notice of Appeal herein, appealing from the Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment, as well as from the court's Summary Judgment itself. Pursuant to SDCL 15-26A-38 please take further notice that the Appellants are the State of South Dakota itself, the State's Governor, the Attorney General, the State's Department of Game, Fish & Parks, and the Secretary of that Department. As such, they are the State, or State Boards or officers. SDCL 15-26A-38 provides that service and filing of the Notice of Appeal perfects the appeal and stays the execution or performance of the Judgment or Order appealed from. No undertaking or bond needs be given in order to effectuate this stay.

Dated this 28th day of December, 2004.

LAWRENCE E. LONG
ATTORNEY GENERAL

/s/ Craig M. Eichstadt
Craig M. Eichstadt
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215

j-pld.cme Notice of Stay Benson et al. v. Rounds et al.

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)
: SS.
COUNTY OF TRIPP)

* *

ROBERT BENSON, JUDITH BENSON, JEFF MESSMER, and TRICIA MESSMER,

Plaintiffs,

-vs-

STATE OF SOUTH DAKOTA; M. MICHAEL ROUNDS, in his official capacity as Governor of the State of South Dakota; LARRY LONG, in his official capacity as Attorney General of the State of South Dakota; SOUTH DAKOTA DEPARTMENT OF GAME, FISH & PARKS; and JOHN COOPER, in his official capacity as Secretary of the South Dakota Department of Game, Fish & Parks,

Defendants.

Civ. 03-121

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Dec. 17, 2004)

* *

The plaintiffs, Robert and Judith Benson, and Jeff and Tricia Messmer, having moved for summary judgment pursuant to SDCL 15-6-56(b), with a Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and the supporting Affidavits of Robert and Judith Benson,

and Jeff and Tricia Messmer; and the defendants, having moved for summary judgment pursuant to SDCL 15-6-56(b), with a Brief in Support of Defendants' Summary Judgment Motion and in response to plaintiffs' Motion; and the plaintiffs, having served a Memorandum in Opposition to Defendants' Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment; and the defendants, having served a reply brief on defendants' summary judgment motion and plaintiffs' summary judgment motion; and the matter having come on for hearing before this Court in the Stanley County Courthouse in Ft. Pierre, South Dakota, at 1:00 p.m. on June 30, 2004; and the plaintiffs, having appeared by and through their attorneys, Christopher D. Dohrer of Aberdeen, South Dakota, and S. Amanda Koehler of Lakewood, Colorado; and the defendants having appeared through their attorneys, Craig M. Eichstadt and Robert E. Mayer of Pierre, South Dakota; and the Court having heard the arguments of counsel, having examined the pleadings and evidence before it, and having taken the matter under advisement; and the Court, having issued its Memorandum Decision regarding the above-referenced motions on or about November 30, 2004; now, therefore, in accordance with the Court's Memorandum Decision, it is hereby ORDERED as follows:

1. That the Plaintiffs' Motion for Summary Judgment is hereby GRANTED, and the relief prayed for in the Plaintiffs' Complaint is GRANTED, to wit:

A. SDCL § 41-9-1.1(2) is a taking of the Plaintiffs' private property for public use, requiring the payment of just compensation pursuant to Article VI, Section 13, of the South Dakota Constitution;

B. SDCL § 41-9-1.1(2) is a taking of the Plaintiffs' private property for public use requiring the payment of just compensation pursuant to the Fifth Amendment to the United States Constitution;

C. In enforcing SDCL § 41-9-1.1(2), Defendants have deprived Plaintiffs of "rights, privileges, or immunities secured by the Constitution and laws" and are liable therefor under 42 USC § 1983;

D. SDCL § 41-9-1.1(2) is hereby declared void;

E. The Defendants are hereby enjoined from enforcing SDCL § 41-9-1.1(2);

F. As the prevailing party on the 42 USC § 1983 claim, the Plaintiffs are entitled to recover their reasonable attorney's fees and costs, in accordance with 42 USC § 1988; and

G. Application for taxation of costs and attorney's fees shall be made within thirty (30) days of entry of this Order and the Judgment, in accordance with SDCL 15-6-54(d).

2. That the Defendants' Motion for summary Judgment is hereby DENIED.

Dated: December 17, 2004

BY THE COURT:

By /s/ Kathleen [Illegible]
Circuit Court Judge

ATTEST:

/s/ Marsha Hodge
Clerk

By _____
Deputy

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)
: ss.
COUNTY OF TRIPP)

ROBERT BENSON, JUDITH BENSON, JEFF MESSMER, and TRICIA MESSMER,
Plaintiffs,

vs.

STATE OF SOUTH DAKOTA; M. MICHAEL ROUNDS, in his official capacity as Governor of the State of South Dakota; LARRY LONG, in his official capacity as Attorney General of the State of South Dakota; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; and JOHN COOPER, in his official capacity as Secretary of the South Dakota Department of Game, Fish and Parks,
Defendants.

CIVIL 03-121

MEMORANDUM DECISION

The above matter came before this court on June 30, 2004, and by agreement of the parties it was held at the Stanley County Courthouse, Fort Pierre, South Dakota. The Plaintiffs, Robert and Judith Benson and Jeff and Tricia Messmer, were represented by their attorneys, Christopher D. Dohrer of Aberdeen, South Dakota and S. Amanda Koehler, of Lakewood, Colorado. The Defendants

appeared by and through their attorneys, Craig M. Eichstadt and Robert E. Mayer of Pierre, South Dakota.

On January 5, 2004, Plaintiffs submitted their *Motion for Summary Judgment.* On February 27, 2004, Defendants submitted their *Motion for Summary Judgment.* The court has considered the file herein, including the pleadings and affidavits, together with the briefs and arguments of counsel and being fully advised in the premises enters this written memorandum decision.

Statement of the Case and Facts

Plaintiffs filed their *Complaint* on October 22, 2003. Plaintiffs challenge the constitutionality of SDCL § 41-9-1.1(2) under Article VI, Section 13 of the South Dakota Constitution and under the Fifth Amendment of the United States Constitution which is applicable to the States through the Fourteenth Amendment. Plaintiffs seek declaratory relief, injunctive relief and prospective relief under 42 USC 1983. Defendants filed their *Answer* on November 19, 2003.

Plaintiffs Robert and Judith Benson reside on and operate a ranch in Tripp County, South Dakota. The Benson ranch is operated primarily for agricultural purposes, including livestock and a variety of crops. Plaintiffs Jeff and Tricia Messmer reside on and operate a farm in Jerauld County, South Dakota. The Messmer farm includes a cattle and grain operation, crops and pasture. Plaintiffs also operate private hunting lodges and maintain private hunting grounds on their property. Plaintiffs' properties are bordered by several miles of county and township roads that are used for road hunting. About 65 acres of the Benson Ranch is cultivated exclusively for

pheasant habitat, so road hunters are particularly attracted to the roads that border this property. Plaintiffs have observed that the shooting of pheasants by road hunters is especially concentrated on those portions of their property that is devoted to pheasant habitat, at the expense of their hunting business and the incomes they derive from that business.

On March 22, 2003, the South Dakota Legislature amended a South Dakota hunting law to provide that "hunting on highways or other public rights-of-way" includes shooting at small game that is in flight over private land if the small game has taken flight from or is in the process of flying over the right-of-way. SDCL § 41-9-1.1(2). South Dakota has long provided for public hunting within highways or other public rights-of-way, including section line easements. SDCL §§ 41-9-1.1, 41-9-3. Plaintiffs have observed that in the 2003 hunting season, following the change in the road hunting law implementing SDCL § 41-9-1.1(2), the behavior of those hunting from the roads has been bolder and more aggressive. Plaintiffs have observed numerous hunting violations which compromise the safety of the hunters, the landowners and the livestock, and which has caused damage to their homes, farm equipment, vehicles and outbuildings.

Legal Standard

The trial court may grant summary judgment only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SDCL §15-6-56(c). Both parties concede that for purposes of the summary judgment hearing there are no genuine issues as to any material fact. When making the

analysis, the Court must view the evidence in a light most favorable to the nonmoving parties, and resolve reasonable doubts against the moving parties. *Satellite Cable Services. vs. Northern Electric,* 1998 SD 67, ¶5, 581 NW2d 478, 480. Therefore, this court must accept as true all of the material allegations set forth in the pleadings and affidavits on file herein. If any basis exists to support summary judgment, affirmance is proper. *Satellite Cable Services,* supra, citing *Petersen v. Dacy,* 1996 SD 72, ¶ 5, 550 NW2d 91, 92 (citing *Trippet Special Trust v. Blevins,* 1996 SD 29, ¶ 6, 545 NW2d 216, 221); Waddell v. Dewey Cty. Bank, 471 NW2d 591, 593 (SD 1991); see also *Wilson v. Great N. Ry. Co.,* 83 SD 207, 211, 157 NW2d 19, 21 (1968). Statutory interpretation presents a question of law reviewable de novo. *Satellite Cable Services,* supra, citing *Lustig v. Lustig,* 1997 SD 24, ¶ 5, 560 NW2d 239, 241; *Moss v. Guttormson,* 1996 SD 76, ¶10, 551 NW2d 14, 17; *Wharf Res., Inc. v. Farrier,* 1996 SD 110, ¶ 5, 552 NW2d 610, 612.

Challenges to the constitutionality of a statute face a heavy burden. The South Dakota Supreme Court recognizes a strong presumption that a statute is constitutional. *State v. Asmussen,* 2003 SD 102, ¶ 2, citing *State v. Allison,* 2000 SD 21, ¶5, 607 NW2d 1, 2. In order to prevail, a challenger must refute this presumption beyond a reasonable doubt. *Asmussen,* supra, citing *State v. McGill,* 536 NW2d 89, 94. "While legislative acts are presumed to be constitutional, that presumption disappears when the unconstitutionality of the act is, 'clearly and unmistakenly shown and there is no reasonable doubt that it violates constitutional principles.'" *Asmussen,* supra, citing *South Dakota Education Ass'n/NEA By and Through Roberts v.*

Barnett, 1998 SD 84, ¶22, 582 NW2d 386, 392 (quoting *Poppen v. Walker,* 520 NW2d 238, 241 (SD 1994).

Statement of the Issues

I. **Whether this court has jurisdiction to determine the constitutionality of SDCL § 41-9-1.1(2)?**

II. **Whether Plaintiffs are entitled to a judgment as a matter of law that SDCL § 41-9-1.1(2) violates the Taking Clause of the South Dakota Constitution and the United States Constitution?**

Memorandum Decision

I. This court has jurisdiction to determine the constitutionality of SDCL § 41-9-1.1(2).

Defendants argue that *Pennington County v. State,* 2002 SD 31, 641 NW2d 127 prohibits this court from determining the constitutionality of SDCL § 41-9-1.1(2). In *Pennington County v. State,* supra, Pennington County sued the State of South Dakota Unified Judicial System for a judgment declaring that the county did not have to provide space for court services in the courthouse or that the State had to pay for the space. The Supreme Court, *sua sponte,* raised the issue of jurisdiction and held that the trial court was without subject matter jurisdiction to enter a judgment against the state.

The Supreme Court held in *Pennington County,* supra at ¶16:

> The State cannot be sued for declaratory relief. Declaratory actions are authorized under SDCL

21-24-3. The statute provides that any *person* whose rights are affected by a statute may obtain a declaration of rights. SDCL 21-24-3. "Person" is defined in SDCL 21-24-2 as "any person, partnership, joint stock company, unincorporated association, or society, or municipal, *public* or other *corporation* of any character whatsoever." (emphasis added). A county is a body corporate with power to sue and be sued. SDCL 7-18-1. Therefore a county may bring a declaratory judgment action, but not against the State. SDCL 21-24-7 provides that "when declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration." (emphasis added). *Danforth v. City of Yankton,* 71 SD 406, 412, 25 NW2d 50, 53 (1946) sets out the jurisdictional requisites for a declaratory judgment action:

> (1) There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interest are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination. (emphasis added).

Under SDCL 21-24-2, the State does not meet the definition of a person because South Dakota is a state, not a person, partnership, joint stock company, unincorporated association, society or a municipal, public or other corporation of any character. Since the State is not a person, the State is not a proper party and the trial court did

not have jurisdiction to enter declaratory relief in favor of the county.

This court find that *Pennington County v. State,* supra, is distinguishable from this case and therefore is not applicable.

Unlike *Pennington County,* this case involves a constitutional question and the facts are not in dispute. It is settled law that an action for declaratory action will lie where a constitutional question is involved or the legality or the meaning of a statute is in question and no question of fact is involved. *Bunis v. Conway,* 17 A.D. 207, 208, 234 NYS2d 435, 437, citing *Dun & Bradstreet v. City of New York,* 276 NY 198, 206, 11 NE2d 728, 732. (bookseller who had been threatened with prosecution if he sold a certain book could maintain a declaratory judgment action against the state prosecutor.) The remedy of declaratory judgment is available, not only where the validity of a statute is in question, but also where it's construction or its application to an undisputed set of facts is in question. *Bunis v. Conway,* supra, citing *New York Foreign Trade Zone Operators, Inc. v. State Liquor Authority,* 285 NY 272, 34 NE2d 316.

In addition, in *Pennington County v. State,* supra, the remedy requested was solely one for a declaratory judgment. In this case, Plaintiffs challenge the constitutionality of a state hunting statute, and they seek prospective relief, including declaratory and injunctive relief, under Section 1983 for violation of their civil rights "under color of state law." See, 42 USC § 1983; *Ex Parte Young,* 209 US 123, 151-160 (1908). A state's sovereign immunity does not bar certain actions against state officers for injunctive or declaratory relief, and a suit to restrain unconstitutional

action by a state officer is not a suit against the state. See, 22A Am.Jur.2d *Declaratory Judgments,* § 231, p.768. See also, *Will v. Michigan Dept. of State Police,* 491 US 58, 71 n. 10 (1989) ("official-capacity actions for prospective relief are not treated as actions against the state."); *Ramirez v. Weinberger,* 745 F.2d 1500, 1523, 240 U.S.App.D.C. 363 ("while the courts may properly find that the only relief for an authorized taking of private property is compensation in accordance with the just compensation requirement of the fifth amendment, injunctive relief is available when the landowner proves that government officials lack lawful authority to expropriate his property."); *Penn Central Transportation vs. City of New York,* 438 US 104,119, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Agins v. City of Tiburon,* 447 US 255, 258-259, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *First Evangelical Lutheran Church of Glendale vs. County of Los Angeles,* 482 US 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); and *Boise Cascade Corp. vs. State of Oregon,* 991 P.2d 563 (Or.App. 1999).

This Court has jurisdiction to enjoin the State and its officials from recognizing the validity of and enforcing SDCL § 41-9-1.1(2) because the "states and their officers are bound by obligations imposed by the Constitution." *SDDS, Inc. v. State,* 650 NW2d 1, 8 (SD 2002). "The Fifth Amendment in general and the takings clause in particular are integral parts of the Constitution, and they are applicable to the states through the Fourteenth Amendment." *SDDS, Inc. v. State,* supra. Accordingly, "[i]t follows that South Dakota's sovereign immunity is not a bar to [Plaintiffs'] Fifth Amendment taking claim." *SDDS, Inc. v. State,* supra at pp. 8-9; see also, *Boise Cascade Corp. v. Board of Forestry,* 991 P.2d 563, 567 (Or.App. 1999) ("states may be required to provide promised remedies in

state court proceedings by force of the Due Process Clause alone."); *First Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 US 304, 315 (1987) (recognizing that the takings clause is self-executing and its remedy is not dependent on statutory facilitation).

In *Heisse v. State of Vermont,* 519 F.Supp. 36, 44 (D.Vt. 1980), the Petitioner was a board certified otolaryngologist duly licensed to practice medicine in Vermont, Maryland and New York. Dr. Heisse was also a practitioner in the field of truth and deception detection, particularly in the use of Psychological Stress Evaluator [PSE]. Dr. Heisse alleged that as a PSE operator, he and others had been denied a license under Vermont's Polygraph Examiners Act and this state licensing statute has the effect of precluding him from practicing his profession thereby violating rights secured by the United States Constitution. In *Heisse* the state officials, acting in their official capacity, claimed they were barred by immunity afforded public officials acting in good faith. The *Heisse* court found that an action may be pursued against state officials for declaratory and injunctive relief and referenced "considerable and respectable authority to the effect that government officials acting in their official capacity are not immune from 1983 actions in which declaratory and injunctive relief is sought." *Heisse,* supra, citing *Slavin v. Curry,* 574 F.2d 1256 (5th Cir. 1978), modified 583 F.2d 779 (1978); *Boyd v. Adams,* 513 F.2d 83 (7th Cir. 1975); *Harris v. Harvey,* 419 F.Supp. 30 (E.D.Wis. 1976).

In *Bogue v. Clay County,* 75 SD 140, 60 NW2d 218 (SD 1953), a landowner brought suit against Clay County to enjoin the county from discharging surface water and silt upon his land and for damages resulting from the flooding of the land. Clay County argued that even if it did

artificially divert water onto and flood the landowner's property, the landowner is not entitled to injunctive relief. The South Dakota Supreme Court rejected this argument and recognized that an injunction is a well recognized remedy for taking or damaging of private land for a public use without prior payment. *Bogue,* 60 NW2d at 223.

Clearly, this court has jurisdiction to determine the constitutionality of SDCL § 41-9-1(2).

II. Plaintiffs are entitled to a judgment as a matter of law that SDCL § 41-9-1.1(2) violates the Taking Clause of the South Dakota Constitution and the United States Constitution.

Plaintiffs contend that SDCL § 41-9-1.1(2) is an unconstitutional taking of private property without just compensation in violation of the South Dakota Constitution and the United States Constitution. Before this issue is considered, this court must emphasize what is *not* in dispute. Plaintiffs do not challenge the Supreme Court's decision in *State vs. Ries* [sic], 1996 SD 75, 550 NW2d 78, which held that hunting and other recreational uses of road rights-of-way is permissible. In *Reis v. Miller,* 1996 SD 75, ¶20 the Supreme Court has clearly indicated that they "combine a broad reading of the easements for public use with legislative and judicial recognition of recreational use of public highways and conclude that hunting, fishing and trapping are included in the public right-of-way easements in South Dakota." The Supreme Court further recognized that it is the appropriate function of the South Dakota Legislature to determine the extent of the recreational easement. *Id.* Plaintiffs challenge only the provisions of SDCL § 41-9-1.1(2) insofar as it allows hunting of small game in flight over private land. Therefore, this

court is limited in determining the sole issue of whether the South Dakota legislature, in performing its function of setting the parameters for road hunting, overstepped the constitutional boundaries when it enacted SDCL § 41-9-1.1(2).

A. Historical Background

An analysis of the issue before this court would be incomplete without a review of the history and tradition of hunting in South Dakota, and in particular road hunting.

Defendants' brief sets forth an accurate history of hunting in South Dakota. It provides:

> At the time when the land was being settled, homesteaders and other settlers used the area as it existed to hunt and fish for food as they journeyed through this and other states seeking areas to claim land or trapping in the wintertime to supplement their incomes. *See* E. Dick, *The Sod House Frontier* (University of Nebraska, Lincoln, 1937, 1954) at 157, 158. There were no criminal trespass laws prohibiting hunting, fishing, or trapping when the lands were settled around and before 1880.
>
> After lands were settled, the Legislature began to adopt laws making certain acts of trespass a crime. At first, landowners were required to take affirmative steps to ban hunting on their property. As noted by Justice Gilbertson, beginning [in] 1899, hunters were barred from lands if they "knowingly hunted on enclosed, occupied, or cultivated lands of another without the consent of the owner or tenant." R.PolC 1903 3074 (7n). Hunters committed a misdemeanor if they knew the area was occupied, enclosed, or cultivated and they did not have the owner's consent. In all other instances, there was no crime in hunting on

private lands. The 1899 law apparently did not set up a method for providing notice of the landowner's intentions.

The law was amended and updated to provide for posting of private lands in 1909. SD Sess.L. ch. 240, § 25. Under this law, a person could hunt almost anywhere unless the land was posted "no hunting" in the English language in conspicuous places. *Id.* To the extent that growing or standing grain fields were involved, permission was required from the land owner. *Id.* In 1919, the law was changed so as to provide that permission was required on all cultivated lands, not just grain. 1919 SD Sess.L. ch. 216. The Legislature once again amended the law in 1925 so as to delete the permission requirement for cultivated lands. Posting was required for all lands as of 1925. 1925 Sess.L. ch. 175.

In 1929, the Legislature adopted a law requiring permission of the land owner if the land was enclosed with a woven wire fence. 1929 SD Sess.L. ch. 136. In 1947, the Legislature required permission from the land owner if the land was fenced with woven fire, there was farm livestock or unharvested grain present, or the hunting was to take place within 40 rods of a dwelling or school house. 1947 SD Sess.L. ch. 112. Posting was required for all other lands. *Id.* The signs were required to be no less than 80 rods apart. The Legislature also adopted various other changes, as noted in the source notes of SDCL § 41-9-1.1. Among other things, these changes involved access to church lands, big game hunting, and hunting west of the Missouri River.

Until the year 1973, posting was required in most instances except where livestock, crops, dwellings or school houses were involved. Beginning in 1973, however, the Legislature criminalized *any* hunting on

> private lands, outside of road rights-of-way, without permission of the landowner. *See* 1973 SD Sess.L. ch. 269. This significant law completed the gradual change, over a 75 year period, from opening hunting unless the land owners took affirmative action to deny public the right to hunt to a requirement that hunters obtain permission in most instances. By 1973, the law barring hunting on most private lands except for section line highways. *Id. See Ries* [sic] *v. Miller,* 1996 SD 75, 550 NW2d 78; *See also State v. Rumpca,* 2002 SD 124, 652 Nw2D 75; *State v. Tracy,* 539 NW2d 327 (SD 1995); *State v. Peters,* 334 NW2d 217 (SD 1983).[1]

In *Ries* [sic] *v. Miller,* 1996 SD 75, ¶27-31, 550 NW2d 78, the South Dakota Supreme Court held that hunting, fishing and trapping are included in the public right-of-way easements in South Dakota. In his concurring opinion Chief Justice Gilbertson provided the history which clearly shows that South Dakota "has a tradition of allowing hunting except where the Legislature has chosen to restrict or prohibit it."[2] The Chief Justice writes:

> Historically, there is no support for the contention of the Plaintiffs that the Territorial Legislature in 1870, when accepting the rights-of-way easement from the Federal Government by enacting what is now SDCL 31-18-1, somehow intended to limit or preclude hunting from these ribbons of real estate. During the Territorial period, no limitations can be found on hunting anywhere although I presume that a landowner could maintain an action for trespass for entering on his land without his permission. See *Clark v.*

---

[1] *See, Brief in Support of Defendants' Summary Judgment Motion and in Response to Plaintiffs' Motion*, pp. 6-8.

[2] *Reis v. Miller,* 1996 SD 75 ¶27, 550 NW2d 78.

Bates, 1 Dakota 42, 46 NW 510 (1874), aff'd, 95 US 204, 24 LEd 471 (1877). However, acts committed within the section line were not held to be a trespass upon the adjoining landowner's real property. *State v. Bonine,* 41 SD 231, 170 NW 138 (1918). As to wild game specifically, it was not until 1899 that the South Dakota Legislature passed its first limitation on hunting anywhere in the State, by requiring the owners' permission to hunt on private land. See SDCL 41-9-1.

At common law, wild game was deemed to be the property of the sovereign or state and not of the private real property owner. *State v. Pollock,* 42 SD 360, 365, 175 NW 557, 558 (1919). Therein we stated:

> This power of the state is based largely on the circumstance that the property right to the wild game within its borders is vested in the people of the state in their sovereign capacity; and as an exercise of its police powers and to protect its property for the benefit of its citizens, it is not only the right, but it is the duty of the state to take such steps as shall preserve the game from the greed of hunters. . . . The right to kill the game is a boon or privilege granted either expressly or impliedly by the sovereign authority and is not a right inhering in any individual. . . .

42 SD at 365-66, 175 NW at 559 (quoting 12 RCL 685). This common law doctrine was reinforced in 1899 by the passage of what is now SDCL 41-1-2, which provides in part, that "any game bird, game animal, or game fish . . . shall always and under all circumstances be and remain the property of the state. . . ."

> Eighty-two years were to go by until the Legislature sought to limit hunting within certain rights-of-way simply because of that realty's status by the amendment of SDCL 41-9-1.1 to that effect. *State a Peters*, 334 NW2d 217, 221 (SD 1983). Prior to that time, the only applicable statutory hunting restrictions in existence were those generally pertaining to hunting such as bag limits or for the protections of farm buildings, fields and schools. See SDC 1939, §25.0427.
>
> Thus, the claim that somehow in the 1870's or at anytime thereafter, the Dakota Territorial Legislature or the South Dakota Legislature intended to preclude all public hunting within public rights-of-way is without any supporting authority – all authority points to the contrary. Some might have wished that those Legislatures had spoken differently, but we cannot remake history. *DeCoteau v. District County Court*, 420 US 425, 449, 95 SCt 1082, 1095, 43 LEd2d 300, 317 (1975).

SDCL § 41-9-1.1(2) was enacted by the South Dakota Legislature in response to *State v. Rumpca*, 2002 SD 124, 652 NW2d 795, wherein the South Dakota Supreme Court upheld Rumpca's criminal trespass conviction for shooting from a right-of-way at a bird flying over private land.

A. SDCL§ 41-9-1.1(2) denies Plaintiffs' right to exclusive use and peaceful enjoyment of their property.

The Fifth Amendment to the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation" which of course is made applicable to the States through the Fourteenth Amendment. *Penn Central Transportation Co. vs. City of*

New York, 438 US 104, 122, 98 S.Ct. 2646, 57 L.Ed.2d 631, citing *Chicago B&Q R Co. vs. Chicago*, 166 US 226, 239, 17 S.Ct. 581, 585, 41 L.Ed.2d 979 (1897). The pertinent words of Article IV, § 13 of the South Dakota Constitution are the familiar ones: "[p]rivate property shall not be taken for public use, or damaged, without just compensation . . .

The United States Supreme Court has repeatedly held "that, as to property reserved by its owner for private use, 'the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Nollan vs. California Coastal Commission*, 483 US 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, citing *Loretto vs. Teleprompter Manhattan CATV Corp.*, 458 US 419, 433, 102 S.Ct. 3164, 3175, 73 L.Ed.2d 868 (1982), quoting *Kaiser Aetna vs. United States*, 444 US 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979). Justice Scalia wrote:

> In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 US, at 432-433, no.9, 102 S.Ct., at 3174-3175, no.9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Id., at 434-435, 102 S.Ct., at 3175-3176. We think a **"permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."**

(Emphasis added). Thus, "even if the government physically invades only an easement in property, it must nonetheless pay compensation. *Loretto*, 458 US at 433. With regard to regulations that compel the property owner to suffer a physical invasion of his property, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [the U.S. Supreme Court] ha[s] required compensation." *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1015 (1992).

By its enactment of SDCL § 41-9-1.1(2), the State grants hunters permission to shoot onto and over private land. The question then becomes whether the firing of bullets over and onto private property is a physical invasion.

In *United States vs. Causby*, 328 US 256, 264 (1946), the United States Supreme Court held:

> Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. . . . **The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.**

(Emphasis added). The Supreme Court has held to be "clearly sound" the proposition that if the government subordinated a strip of land "to the right and privilege of the Government to fire projectiles directly across it . . . whenever it saw fit . . . with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." *Portsmouth Harbor*

Land & Hotel Co. vs. United States, 260 US 327, 329 (1922). The Supreme Court further held that the taking of the property right would be complete "if the [government], with the admitted intent to fire across the claimants' land at will[,] should fire a single shot." *Id.* Moreover, "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." *Loretto*, 458 US at 432, fn.9.

Furthermore, an invasion of air space that interferes with the property owner's ability to use and enjoy that portion of the property is a taking; the soil need not be touched. *Causby*, 328 US at 265 ("invasion of [airspace] are in the same category as invasions of the surface"); *Hinman vs. Pacific Air Transport*, 84 F.2d 755, 758 (9th Cir. 1936) ("[landowner's] title to the air is paramount"); *Digirolamo vs. Philadelphia Gun Club*, 89 A.2d 357, 358 (Penn. 1952) (passage of shotgun pellets through the air over plaintiff's land interfered with his enjoyment of land); *Delta Air Corp. v. Kersey*, 20 SE2d 245, 249 (Geo. 1942) (low overflights); *Butler vs. Frontier Telephone Co.*, 79 NE 716, 718 (NY Ct. App. 1906) (telephone wire strung across plaintiff's property).

State law governs the dimensions of property ownership and defines the rights of landowners in relation to the state and private parties. *Oregon ex rel. State Land Board vs. Corvallis Sand & Gravel Co.*, 429 US 363, 378 (1977). Thus, courts must look to "existing rules or understandings that stem from an independent source such as state law" to define those interests that are protected as "property" by the Fifth and Fourteenth Amendments. *Lucas*, 505 US at 1030. However, "the government does not have unlimited power to redefine property rights." *Loretto*, 458

US at 439. Any modification of the contours of property rights must comport with "background principles" of state law:

> [An alteration of property rights] cannot be newly legislated or decreed (without compensation), but must inhere I the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon the land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts.

Lucas, 505 US at 1029.[3] Therefore, a state "may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. vs. Beckwith*, 449 US 155, 164 (1980).

The right to hunt and fish on private property is a transferable interest appurtenant to and separable from the land. SDCL § 43-13-1, 43-13-2. The South Dakota Legislature has chosen to regulate hunting extensively, not just by refusing to criminalize certain behavior but by allowing hunters to hunt only in strict accordance with the provisions of a license issued by the State. See, SDCL §§ 41-1-1, et seq.

SDCL § 41-9-1.1(2) substantially alters background principles of South Dakota law with respect to several key aspects of private property. Landowners in South Dakota traditionally had a right to exclude hunters from their land: "no person may fish, hunt or trap upon any private

---

[3] The U.S. Supreme Court has recently recognized that "[a] law does not become a background principle for subsequent owners by enactment itself." *Palazzolo vs. Rhode Island*, 533 U.S. 606, 630 (2001).

land not his own or in his possession without permission from the owner or lessee of such land." *Reis vs. Miller*, 1996 SD 75, ¶ 6, citing SDCL § 41-9-1. This common-law prohibition against trespassing on private land for hunting was codified in SDCL § 41-9-1 in 1899. Furthermore, South Dakota law clearly provides that private ownership of property includes the right to "use it to the exclusion of others." SDCL § 43-2-1.

Upon statehood, private property in South Dakota was made subject to section line easements that, when improved, provided public access. *Ries* [sic], 1996 SD 75; ¶ 11-12, see also, *State v. Peters*, 334 NW2d 217, 222 (SD 1983). These section line easements were dedicated by federal legislation in 1866 and adopted by the territorial legislation in 1870. *Reis*, supra at ¶ 11. "The use by the public of the section line rights-of-way for recreation, which includes hunting, dates back to the 1880s and has not been successfully challenged in this state to our knowledge." *Reis*, supra at ¶ 19. Thus, based on legal principles in effect prior to statehood, private property in South Dakota was created subject to section line easements and the rights of owners of land adjacent to the section line easements are not infringed by use of those public rights-of-way. Ries [sic], supra at ¶ 20, *Peters*, 334 NW2d at 222-223.

However, public use of the section line easements never included any right to use a landowner's private property beyond the boundaries of the public easement.[4] To the contrary, South Dakota law specifically protects not only the right to exclude hunters from private land but

[4] The width of the section line rights-of-way is sixty-six feet, thirty-three feet on each side of the section line. SDCL § 31-18-2.

also the ownership of space above private lands.[5] See, SDCL § 50-13-3, § 41-9-1. Furthermore, the South Dakota Supreme Court held in *State v. Rumpca*, 2002 SD 124, ¶ 10, 652 NW2d 795, 798, that public hunting within section line easements did not include the right to shoot game on private property:

> Shooting or shooting at a pheasant flying over private property constitutes hunting and is prohibited under SDCL 41-9-1 unless the hunter owns or possesses the land or has the permission of the owner or lessee.

The Supreme Court further held that the common law right of retrieval codified at SDCL § 41-9-8, which allows the "[u]narmed retrieval of lawfully taken small game from private land" does not permit the acting taking of game located on private land. *Rumpca*, supra at ¶ 12 (citing with approval a 1981 South Dakota Attorney General Opinion). "Hunters may not shoot game on private property from a road ditch or public property and then proceed on that private property to retrieve the game unlawfully taken. *Id.*

Defendants argue that SDCL § 41-9-1.1(2) acts only to remove criminal penalties for shooting onto private property under certain circumstances while road hunting, and that the civil trespass remedies remain unaffected. Specifically, Defendants argue that by "decriminalizing" the act of firing onto private property while road hunting, Section 41-9-1.1(2) does not authorize the public to shoot onto Plaintiffs' private property; rather, it merely provides

---

[5] Ownership of the space above private property is subject only to the right of aircraft overflights provided in SDCL § 50-13-4.

that state and local law enforcement will no longer act to prevent or curtail such activity.[6] This court finds no merit in this argument.

The Hunting Handbook, printed and provided to hunters by the State, provides that "[t]o be *lawfully* taken from a public road right-of-way, the hunter must be within the right-of-way boundaries when shooting, and the game must originate from or be flying over the road right-of-way." 2003 South Dakota Hunting Handbook, at p. 33 (emphasis added). Thus, by defining what is "lawful", the Hunting Handbook places hunters and landowners on notice that hunting pursuant to Section 41-9-1.1(2) is not a trespass and that hunters who hunt in this manner may not be prevented from or prosecuted for doing so by landowners. Furthermore, because the Hunting Handbook provides that it is "a synopsis of South Dakota Codified Laws and Game, Fish and Park rules" regarding hunting, [Hunter Handbook at p. 5] hunters who act in accordance with its provisions do so in the knowledge that they are free from self-help action or civil or criminal court action by landowners.

Under the law of trespass in South Dakota, one is subject to liability if he or she "intentionally enters the land in possession of another, or causes a thing or third person to do so. Additionally, a trespass may be committed on, beneath or above the surface of the earth with the exceptions for flight by aircraft." *State v. Rumpca*, 2002 SD 124, ¶ 10, fn 2. In *Rumpca*, supra, the Supreme Court held that shooting over private land at game on the land

---

[6] See, Brief in Support of Defendants' Summary Judgment Motion and in Response to Plaintiffs' Motion, pages 12-16.

constituted a criminal trespass. The boundaries are clear and well-established. "Public highways are under the exclusive control of some unit of government. *Private land is under the exclusive control of its owner.* Where hunting on a public highway is prohibited, it is enforced by the sovereign and not by any private land owners. Accordingly, the right to hunt on public land does not stem from, or depend upon, private land ownership." (emphasis added) *State v. Peters*, 334 NW2d 217 (SD 1983).

However, SDCL § 41-9-1.1(2), as communicated to hunters through the Hunting Handbook, now makes it "lawful" for hunters to shoot onto private property, and landowners no longer possess the right to prevent a physical invasion of their lands. Thus, the state has eviscerated that private property right, as well as the landowners' right to exclusive use of their property and the space above their property. Thus, Sections 41-9-8 and 41-9-9, which purport to preserve civil remedies, are rendered nullities.

Defendants further argue that Section 41-9-1.1(2) does not affect the landowners' right to defend their ownership and exclusive use of their property.[7] Were landowners to do as Defendants suggest, that is, to refuse to accept shooting over their land by those hunting in accordance with Section 41-9-1.1(2), they face prosecution under SDCL § 41-1-8 for "intentionally interfer[ing]" with persons "lawfully" engaged in hunting. See, *Ries* [sic] *vs. Miller*, 1996 SD 75; *State v. Tracy*, 539 NW2d 327 (SD 1995) (landowner appeals from hunter interference convictions).

---

[7] See, Brief in Support of Defendants' Summary Judgment Motion and Response to Plaintiffs' Motion, page 16.

Defendants' interpretation of Section 41-9-1.1(2) creates conflict and confusion between the provisions of SDCL 22-18-4 and SDCL 41-1-8, leaving hunters and landowners unsure of their rights and remedies. Either the State Legislature has chosen to allow hunters to invade private property under color of law and thus free of interference by landowners or the State Legislature has told hunters that they may invade private property while hunting but at their own peril. The latter makes no sense. Because the former is the law now in South Dakota, the landowners' right to exclude others from their private property has been taken by SDCL § 41-9-1.1(2).

In *Portsmouth Harbor*, 260 US 327, 330 (1922), repeated and cumulated firing over the plaintiffs' land by the government was held to amount to the imposition of a servitude and a compensable taking. Other courts have recognized that discharging guns over and across private land results in a direct invasion of the property. See, *Citizens For a Safe Grant vs. Lone Oak Sportsmen's Club, Inc.*, 624 NW2d 796 (Minn. App. 2001); *State v. Wilkinson*, 724 So.2d 614 (Ct. App. Fla. 1998) (firing potentially lethal projectile across private land without permission constituted trespass). In *Citizens For a Safe Grant vs. Lone Oak Sportsmen's Club, Inc.*, 624 NW2d 796 (Minn. App. 2001), a neighborhood organization brought a declaratory judgment action against a gun club seeking to enjoin the gun club from continuing a shooting range until the gun club submitted a proposal for making the range safer. The Lone Oak Sportmen's Club consisted of an 11-acre tract to operate four shooting ranges. The gun club's property was surrounded on all sides by privately owned residential property. The Court of Appeals held that the evidence was

sufficient to support a finding that the gun club committed trespass. It stated:

> Trespass encompasses any unlawful interference with one's person, property, or rights, and requires only two essential elements: a rightful possession in the plaintiff and unlawful entry upon such possession by the defendant. (citations omitted). Trespass is not limited to human entry and can include "throwing or placing an object upon the property of another." (citation omitted). Since 1988, respondents have repeatedly complained to Grant about finding bullets on their properties and hearing them fly overhead. The trial court found that shotgun pellets varying in size from # 4 to # 9 shot were collected from the Straka property on November 23, 1999. It is undisputed that respondents never gave appellant permission to permit gun shots onto and over their properties. We, therefore, agree with the trial court that [t]he entry of bullets over and onto adjacent private property resulting from the operation of the rifle ranges at the Gun Club without the permission of the property owners constitutes a trespass.

624 NW2d 796, 805, ¶ 17, 18, 19.

An after-the-fact civil trespass remedy is not a constitutionally acceptable substitute for the right to exclude others initially from private property. See, *Nolan and Nolan vs. City of Eagan*, 673 NW2d 487 (Minn.App. 2003). ("legal remedies are necessarily inadequate if a taking occurred."); *Alcorn vs. Edmonds County*, 241 NW2d 323, 324 (SD 1932) (Article VI, § 13 of the South Dakota Constitution "vests in an owner of property the right to prevent the taking or damaging of property until compensation is paid."); see also, SDCL § 43-2-1 (private ownership of property includes the right to "use it to the

exclusion of others.") Because the "right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property," (*Nollan vs. California Coastal Comm'n*, 483 US 825, 831 (1987)) and because SDCL 41-9-1.1(2) denies landowners that right, this court finds that Plaintiffs have established a *per se* taking of their property and they are entitled to summary judgment. See, *Lucas vs. South Carolina Coastal Council*, 505 US 1003, 1015 (1992).[8]

This court further finds that the "background principles" of South Dakota property law have provided for and protected the right of private landowners to exclude hunters from their land, subject only to limited historical exceptions for improved section line roads and retrieval. SDCL § 41-9-1.1(2) abrogates these "background principles" that prohibited hunting on private land without landowner permission by redefining hunting "on public rights-of-way" to include the "shooting at or taking . . . of small game . . . that are in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way." That is, a landowner no longer has the right to exclude hunters from private property. In that respect, SDCL § 41-9-1.1(2) is an unconstitutional taking as it has plainly altered long-standing "background principles" of

[8] Because this court has found a *per se* taking as the result of a physical invasion of Plaintiffs' property, the economic considerations and multifactor balancing tests found in regulatory taking cases, such as *Agins vs. Tiburon*, 447 US 255 (1980) and *Penn Central Transp. Co. vs. New York City*, 438 US 104 (1978) are inapplicable here.

state law and redefined property in a manner requiring just compensation. *Lucas*, 505 US at 1029.

Conclusion

The Legislature is the proper branch of government to determine whether road hunting shall be permissible in South Dakota. However, when the Legislature sets the boundaries for road hunting, it must do so within the framework of the Constitution. Landowners have the right to determine who hunts on their property in the same way that the legislature has the right to determine who hunts on public lands, including the recreational easement that attaches to section line rights-of-way. The government cannot grant hunters the right to shoot onto the private property of landowners, in the same way that landowners cannot *deny* hunters the right to shoot within the public rights-of-way.

In this case, the Legislature went too far when it granted hunters the right to shoot onto private land. This is the very kind of thing that the Taking Clause was meant to prevent. The Taking Clause stands as a shield against the arbitrary use of governmental power. This court finds that the unconstitutionality of SDCL § 41-9-1.1(2) is clearly and unmistakenly shown and there is no reasonable doubt that it violates constitutional principles. SDCL 41-9-1.1(2) is a taking violative of the Fifth and Fourteenth Amendments of the United States Constitution and Article VI, § 13 of the South Dakota Constitution. Plaintiffs are entitled to summary judgment as a matter of law.

Mr. Dohrer shall prepare Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendants'

Motion for Summary Judgment in accordance with this decision.

Dated this 30th day of November, 2004.

BY THE COURT:

/s/ Kathleen F. Trandahl
Kathleen F. Trandahl
Circuit Judge

ATTEST:

Marsha Hodge
Clerk of Courts

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing **Memorandum Decision** was mailed to:

Mr. Christopher D. Dohrer
Attorney at Law
P.O. Box 1030
ABERDEEN, SD
57402-1030

Ms. S. Amanda Koehler
Attorney at Law
2696 South Lewis Way
LAKEWOOD, CO 80227

Mr. Craig M. Eichstadt
Attorney at Law
500 East Capitol
PIERRE, SD 57501-5070

Mr. Robert E. Mayer
Attorney at Law
500 East Capitol
PIERRE, SD 57501-5070

by U.S. mail, postage prepaid this 30th day of November, 2004.

/s/ Kathleen F. Trandahl
Kathleen F. Trandahl

U.S. Const. amend. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

S.D. Const. art. VI, § 13. Private property not taken without just compensation—Benefit to owner—Fee in highways. Private property shall not be taken for public use, or damaged, without just compensation, which will be determined according to legal procedure established by the Legislature and according to § 6 of this article. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken.

S.D. Codified Laws § 15-26A-38. Stay of execution without bond by public agency or officer

When the state, any state board or officer, any county, township, municipal corporation, school district, or its officers, in a purely official capacity, shall take an appeal, service and filing of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from and no undertaking or bond need be given, but the Supreme Court may, on motion, require security to be given in such form and manner as it shall in its discretion prescribe as a condition of the further prosecution of the appeal.

S.D. Codified Laws § 41-1-8. Interference with lawful hunting, trapping, or fishing prohibited—Violation as misdemeanor

No person may intentionally interfere with any person or group of persons lawfully engaged in the process of taking or attempting to take any game or fish. No person may engage in any activity specifically intended to harass or otherwise prevent the lawful taking of any game or fish. No person may engage in any activity to scare or disturb any game with specific intent to prevent their lawful taking. This section may not be construed to prohibit a landowner from revoking a prior grant of permission to hunt on his land. A violation of any provision of this section is a Class 2 misdemeanor.

S.D. Codified Laws § 41-9-1.1. Highways and public rights-of-way excepted from restrictions—Required distance from livestock or buildings for hunting or trapping—Violation as misdemeanor—Revocation of hunting privileges

Except for controlled access facilities as defined in § 31-8-1, interstate highways, unimproved section lines not commonly used as public rights-of-way, and highways within parks or recreation areas or within or adjoining public shooting areas or game refuges posted for restriction of an applicable use as hereinafter set forth by the Department of Game, Fish and Parks, § 41-9-1 does not apply to fishing, trapping, or hunting on highways or other public rights-of-way within this state that meet the requirements of § 41-9-1.3. For purposes of this section, hunting on highways or other public rights-of-way includes:

(1) The shooting at or taking by legal methods of small game, except mourning dove, that are located within the boundaries of the highway or public right-of-way;

(2) The shooting at or taking by legal methods of small game, except mourning dove, that are in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way.

If subdivision (2) of this section is declared by an advisory opinion or adjudication of the South Dakota Supreme Court to be a taking of private property requiring compensation, subdivision (2) is void.

No person, except the adjoining landowner or any person receiving written permission from the adjoining landowner, may use such highways or rights-of-way for the purposes of hunting defined in this title within a six hundred sixty-foot safety zone surrounding an occupied dwelling, a church, schoolhouse, or livestock. Neither the person discharging a firearm at small game nor the small game being shot at may be within the safety zone. No person, except the adjoining landowner or any person receiving written permission from the adjoining landowner, may use such highways or rights-of-way for the purpose of trapping within six hundred sixty feet of an occupied dwelling, church, or schoolhouse. A violation of this section is a Class 2 misdemeanor. If any person is convicted of knowingly discharging a firearm within six hundred sixty feet of any occupied dwelling, church, or schoolhouse for which such distance has been clearly and accurately marked and posted, the court shall, in addition to any other penalty, revoke the person's hunting privileges for a period of one year from the date of conviction.

[South Dakota Hunting Handbook (2003), page 5]

CONTENTS

INTRODUCTION

Transporting Small Game	6
Staff Listing	7
License Requirements	8

GENERAL LICENSE INFORMATION

Information	9
Resident Licenses	13
Nonresident Licenses	9

HUNTING SEASON INFORMATION

Small Game	16
Pheasant	16
Youth Pheasant	16
Early Resident Pheasant	17
Prairie Chicken Sharp-tailed Grouse	17
Sage Grouse	18
Partridge	18
Other	19
Resident Youth Waterfowl	20
Ducks	20
Canada Goose	22
White-front Goose	22
Light Goose	22
Early Fall Canada Goose	23

Special Unit Canada Goose 23
Big Game 24

LAWS AND REGULATIONS

Transporting, Shipping 25
General Laws 26
Public Road Rights-of-Way 26
Federal Laws for Migratory Game Birds 34
Big Game Regulations 35
Furbearer Regulations 38

HUNTING INFORMATION

Hunter Safety Tips 41
Facts about Chronic Wasting Disease 41
Licenses Just a Computer Away 44
Hunter Ethics 45
State Refuges 47
Public Hunting Areas 48
Valuable Maps for Hunting 49
CONSEP 2000 50
Sunrise/Sunset Chart 52

The Hunting Handbook is a synopsis of South Dakota Codified Laws and Game, Fish and Parks rules.

Mike Rounds, GOVERNOR
John Cooper, *Game, Fish and Parks Secretary*
Doug Hansen, *Wildlife Division Director*

GAME, FISH AND PARKS COMMISSIONERS

Tim Kessler, Chairman, Aberdeen
Ken Barker, Vice Chairman, Belle Fourche
Mert Clarkson, Ludlow
Christine Hamilton, Kimball
Spencer Hawley, Brookings
Randy Kemink, Gettysburg
John Kranz, Mitchell
Les Lindskov, Isabel

* * *

[page 26]

LAWS AND REGULATIONS

General Laws

Laws and rules governing trespass and motor vehicles are complex. The laws may be simplified if the hunter remembers to hunt only on foot during established seasons, to ask permission to enter private land, and not to drive on state and federal lands.

It is also advisable to restrict vehicular travel in wet weather when roads, trails, rangeland, and cropland could be damaged and in dry conditions when fire danger is high.

Hunting on Public Road Rights-of-Way

Public road rights-of-way are open for the hunting of small game and waterfowl (see Mourning Dove, Youth

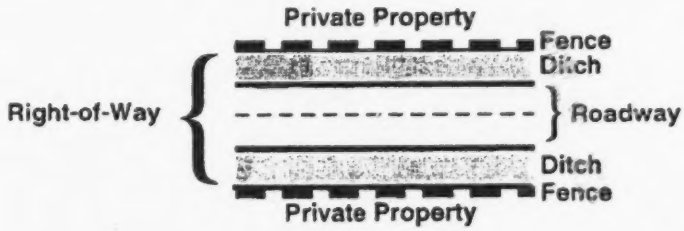
Pheasant Season, and Resident-Only Pheasant Season for special road hunting restrictions). However, no person may hunt within 660 feet of schools, churches, occupied dwellings and livestock. Furthermore, neither the person discharging a firearm nor the small game animal being shot at may be within the 660-foot safety zone.

The public right-of-way along a section line or other highway is open for hunting if:

1. The right-of-way has been commonly used by the public for vehicular travel, as demonstrated by the existence of a well-worn vehicle trail.

2. An intentional alteration or adaptation has been made to the right-of-way to enhance the natural terrain's utility for vehicular travel or to permit vehicular travel where it was not possible before.

NOTE: Fences are sometimes not on a right-of-way boundary and sometimes there is no fence. Most section line rights-of-way are 66 feet wide. Some acquired rights-of-way are wider.



– Hunters can take only small game (except mourning dove) and waterfowl within the right-of-way on foot. The hunter must be within the right-of-way and the game must have taken flight from within or be flying over the right-of-way.

- The person must park or stop their vehicle as far to the right-hand side of the road as possible.
- If the person who discharges a firearm is more than 50 yards from the vehicle, the doors on the side of the vehicle nearest the roadway must be closed, but the engine may remain running.
- If the person who discharges a firearm is less than 50 yards from the vehicle, all of the doors of the vehicle must be closed and the engine shall be turned off.
- It is NOT legal to shoot small game and waterfowl that takes flight from a public right-of-way over a Federal Refuge or Indian Tribal Trust lands. If a State-licensed hunter shoots at a bird across the fence on either of these lands, the hunter may be subject to arrest by Federal Fish & Wildlife officers.
- Small game and waterfowl taken from the right-of-way but falling onto private property can be retrieved by unarmed hunters on foot.
- Big game CANNOT be taken on or from a road right-of-way using a rifle or bow and arrow if the right-of-way meets the requirements of "improved road" as defined above. In other words, if it is legal to hunt a road right-of-way or section line for small game or waterfowl, it is illegal to shoot at big game from there with a rifle or bow and arrow.
- Any person who, while hunting a road right-of-way, negligently endangers another person, or puts that person in fear of imminent serious bodily harm, is guilty of a Class 1 misdemeanor.

* * *

[page 28]

Civil Damage Liability

Besides criminal penalties, persons illegally taking, killing or possessing game birds, game animals or game fish may be civilly liable to the State for damages in the following amounts: $1,000 for each deer, antelope or bobcat; $5,000 for each elk, buffalo or mountain lion; $10,000 for each mountain goat or bighorn sheep; $100 for each game bird and $200 for each wild turkey.

Under certain situations the amount may double.

Any person who has a judgement issued for not paying civil damages will automatically lose their hunting, fishing and trapping privileges until the judgement is paid in full.

* * *

[page 29]

Harassment

No person may intentionally interfere with other persons lawfully engaged in taking or attempting to take game or fish, engage in activity specifically intended to harass or prevent the lawful taking of game or fish, or scare or disturb game with specific intent to prevent its lawful taking.

* * *

[page 33]

Trespass

No person may hunt or trap any species of game, including unprotected species, on private land without permission from the owner or lessee except in that part of the Black

Hills Fire Protection District south of Interstate 90. In that area, no person may enter private land to hunt if the land is posted or if told by the owner or lessee not to do so.

The Black Hills Fire Protection District is within the following boundary: Beginning at the junction of the Wyoming-SD state line and I-90, then east along I-90 to Whitewood, then southeast along the DM&E railroad right-of-way through Sturigs, Tilford, Piedmont and Black Hawk to Rapid City, then south along the DM&E railroad right-of-way through Hermosa, Fairborn and Buffalo Gap to the Cheyenne River, then west along the Cheyenne River to the Wyoming state line, then north along the state line to the point of beginning.

If a person is convicted of knowingly trespassing, the court shall revoke the person's hunting or trapping privilege for one year.

Unarmed Retrieval

Hunters may retrieve lawfully taken small game without permission from private or public land (except National Wildlife Refuges closed to such entry) if they are unarmed and retrieve on foot.

Permission is needed to retrieve big game, including turkeys.

To be lawfully taken from a public road right-of-way, the hunter must be within the right-of-way boundaries when shooting, and the game must originate from or be flying over the road right-of-way.

* * *

TRANSCRIPTION

HOUSE BILL 1163

HOUSE OF REPRESENTATIVES MOTION TO AMEND

PASSED H.J. 582 AMENDMENT (1163tb)

02/22/2003

[2] (The following proceedings were had:)

THE CLERK: House Bill 1163, an Act to revise certain provisions related to hunting and public rights-of-way.

MR. SPEAKER: House Bill 1163, having received a second reading, is up for consideration and final passage. Are there any remarks?

Representative Bill Peterson?

REPRESENTATIVE PETERSON: Thank you, Mr. Speaker.

Ladies and gentlemen, first, let me express my appreciation to the House for the diligence with which you've approached your work today and this evening. I know the hour is late, and I know that you are growing tired and are ready to go home; but we will, after the conclusion of this bill, once again, for the third year in a row reach crossover day by completing our business. And that is something I think that all of us should be proud of.

House Bill 1163 is a very important issue for this body to consider. It is an issue which, frankly, is an attempt to bring landowners and hunters together in our state. We know that in our Constitution there is a fundamental right to property. And we know that in the history of our state, there's been a fundamental [3] tradition of hunters being

able to enjoy the great outdoors and especially to engage in that time-honored tradition which we know as road hunting.

Over the years, however, we're also aware that there's been growing tension and growing disputes between the landowner and the hunter. And these disputes have become bitter. They have become divisive. They have led to incidents along our roads and highways. They have led to court actions.

What we have tried to do in House Bill 1163 –

MR. SPEAKER: Ladies and gentlemen, will you give Representative Peterson your attention, please.

REPRESENTATIVE PETERSON: – is to bring our – these two sides together once again and try to reach an agreement which would protect the rights and interests of both.

I won't tell you that House Bill 1163 is a perfect bill. It's not. What it is, is a good faith effort to answer the concerns of landowners, to answer the concerns of hunters. Many individuals had a hand in this bill, representing many organizations. Some of them continue to support the legislation as the best effort we could come up with this year; some have left the table.

But I believe it is a bill that we need to move forward on. And I'd like to spend just a second and [4] give some credit where credit is due and recognize a former member of this body and current State Senator John Koskan, who perhaps put in as many hours as – more effort than anyone else engaged in this effort.

What House Bill 1163 will do will put back into statute the language – any language – that which we commonly believe is the definition of road hunting. And you will find that, ladies and gentlemen, on Page 1, Lines 10 through 13, and Page 2, Lines 1 through 4.

Beyond that, in Section 2 it will add new language to law to try and address the legitimate concerns of rural people and landowners about safety issues on our roads and highways. It clearly spells out the steps that road hunters must take before they can hunt in terms of securing their vehicles and in terms of making sure that others who may be using those roads or highways are not affected negatively by vehicles who have been stopped for the purposes of allowing the owners or occupants to go road hunting.

There is an amendment that will be offered to this bill. I consider it to be a friendly amendment, an amendment which helps to add to the issue of safety in our – in the rural parts of South Dakota. And I hope that you will support it.

I'm going to close as I began and tell you [5] this isn't a perfect bill, but I don't know what we will do if we do not pass it. It's an effort to bring the parties together, parties who have been long apart; parties that have been long apart and growing further apart. My fear is that if this bill does not pass and if we do not keep this conversation going, that they will become even further apart. And that will lead to even further court action or attempts through the ballot to change the laws and rules of our state. Those efforts can only add to the divisiveness that this issue has caused in our state.

So I hope that you can support House Bill 1163 knowing that it is not perfect, but knowing that it was a good-faith effort, that it was a negotiated bill, that it involved all the interests from the Game, Fish, and Parks to the landowners to the hunters; and that without it, we leave this body with nothing today. Please support House Bill 1163.

MR. SPEAKER: Further remarks from Representative Mel Olson.

REPRESENTATIVE OLSON: Thank you, Mr. Speaker. I have a motion at the desk –

MR. SPEAKER: 1163tb?

REPRESENTATIVE OLSON: Yes, sir. It has been distributed.

[6] MR. SPEAKER: Is there a second?

UNIDENTIFIED SPEAKER: (Inaudible.)

MR. SPEAKER: Comments on that motion of Representative Olson, and I will grant you latitude to speak to the amendment and the bill, sir.

REPRESENTATIVE OLSON: Thank you, Mr. Speaker.

I serve on the State Affairs Committee with Representative Bill Peterson where we heard this bill. And you could divide the opponents' comments into two categories. One has to do with property rights. And, frankly, you can't deal with their issues and still have road hunting.

But the other issue was dealing with safety, and that's what this amendment attempts to do. I asked Secretary

Cooper of the Game, Fish, and Parks to answer some questions – he didn't have a dog in this hunt – but to answer some questions. And through the course of those answers, I became aware that as long as a hunter stayed – a road hunter stayed out of the 660-foot zone, he could fire into the 660-foot zone and shoot birds in that area. That would seem to abrogate the 660-foot area for safety. And so the first part of the amendment simply says that not only must the hunter be outside that safety zone, but also the bird that he's shooting at. And, frankly, that will take care of many of the concerns [7] of the people who are concerned about the safety of road hunting. Again, I don't purport to solve the property right concerns.

The second part of it was it seemed strange to me that we would, in the law, protect an occupied dwelling, a church, a schoolhouse, or livestock, but we would be silent about people. And I asked the secretary that question, as well. And he indicated that the safety of people was covered in other areas of the statutes, statutes dealing with the reckless discharge of a firearm.

And so what we're doing with the second part of the amendment is bringing that into the road hunting portion of the law as well, and saying that if a person who's road hunting recklessly or negligently endangers another person – and it's my understanding that that's defined elsewhere in the code – or puts them in fear of imminent serious bodily harm, that that guilty hunter, if found so by the court, will be guilty of a Class 1 misdemeanor.

That answers the questions about concern over the 660-foot safety zone. That answers the questions about concerns for the individuals. I fully recognize that the property right issue has not been dealt with and, frankly,

can't be dealt with. I would hope that the [8] body would look favorably upon this amendment and then, upon the bill.

Thank you, Mr. Speaker.

MR. SPEAKER: Further remarks on the Olson motion to amend?

Representative Rounds?

REPRESENTATIVE ROUNDS: Thank you, Mr. Speaker. Permission to address both the amendment and the bill?

MR. SPEAKER: Granted, sir.

REPRESENTATIVE ROUNDS: Thank you.

Members of the body, I come from District 24, which is the central part of South Dakota: Hughes, Stanley, and Sully Counties. People in my district – a wide variety of people here. We've got landowners here. We've got some of the best hunting in the state within this district. But then we have communities with families who are limited on their places to hunt. So, as you can tell, this is a very hot topic here. It's an important issue.

Up till now there's been countless hours spent between the landowners and the hunters working on this bill. In my discussions with them, they continue to plan – to continue to have more hours of the discussion. This is not the most perfect bill. The amendment itself, [9] I still have questions on. But I'm going to ask the body to pass the amendment, and I'm going to ask the body also to pass the bill.

I want to keep this discussion rolling. I want to get something finished here this year that both parties can live with. Both sides have agreed to continue talking. I want to see it go. So I'm asking for your support on the amendment; I'm asking your support on the bill; and let's pass it on. Thank you.

MR. SPEAKER: Further remarks on the motion to amend?

Representative Juhnke?

REPRESENTATIVE JUHNKE: I have a question of the sponsor of the amendment.

MR. SPEAKER: State your question, sir.

REPRESENTATIVE JUHNKE: Representative Mel Olson, Section 3 where you're describing any person who, while hunting a road right-of-way recklessly or negligently endangers another person, does that pertain to only a firearm? Or could that pertain to vehicles?

MR. SPEAKER: Representative Olson, do you wish to answer the question?

REPRESENTATIVE OLSON: Thank you, Mr. Speaker, yes, I will.

It was my impression that it would be dealing [10] strictly with firearms. But now that you mention it, I think you could make a case it would apply either way.

MR. SPEAKER: Representative Juhnke, you have the floor.

REPRESENTATIVE JUHNKE: I will wait till later.

MR. SPEAKER: Further remarks on the Mel Olson – Representative Mel Olson motion to amend?

Representative Nannett (phonetic)?

REPRESENTATIVE NANNETT: I have a question for Representative Olson.

MR. SPEAKER: State your question, sir.

REPRESENTATIVE NANNETT: This amendment mentions livestock. Are we talking about any cow, anywhere?

MR. SPEAKER: Representative Olson, do you wish to answer that question?

REPRESENTATIVE OLSON: Yes, I do, Mr. Speaker.

This is language that's in the current hunting statutes. So if you were road hunting and there's no building, there's no church, there's no schoolhouse, but there's one cow standing there, you got to be 660 feet away from that cow. And that's current hunting regulations.

MR. SPEAKER: Representative Nannett, you have [11] the floor.

REPRESENTATIVE NANNETT: Thank you.

MR. SPEAKER: Further remarks on the Representative Olson motion to amend?

Hearing none, the question for the House of Representatives is the Representative Olson motion to amend, 1163tb. Those in favor of that motion to amend will signify by saying aye.

UNIDENTIFIED SPEAKERS: Aye.

MR. SPEAKER: Those oppose nay.

UNIDENTIFIED SPEAKERS: No.

MR. SPEAKER: Motion carried.

Further remarks on House Bill 1163 as amended?

Representative Frost?

REPRESENTATIVE FROST: Well, ladies and gentlemen of the body, I think we've finally gotten to the point where this bill should pass out of the House.

I remember when I was growing up, we didn't have trespass laws, and what a wonderful thing that was. And I had boys that like to hunt, and we watched things change as they went the other way.

I think were at the point in our lives where maybe we can bring it back just a little bit. There's been some compromises. I think this is a good bill. Like they say, it's not perfect, but we can move it on. [12] Let's do it tonight. Let's get on with it. Thank you.

MR. SPEAKER: Further remarks on House Bill 1163 as amended?

REPRESENTATIVE RHODEN: Mr. Speaker.

MR. SPEAKER: Representative Rhoden?

REPRESENTATIVE RHODEN: Thank you, Mr. Speaker.

Members of the House, while I have a few comments that I need to make, the bill you've got before you does one thing: It chisels away at property owners' rights. And

that's all it does. Property owners' rights are guaranteed constitutionally. Hunters' rights are not. Hunting is a time-honored tradition in the State of South Dakota and a treasured privilege, but it's not a right. We should make no mistake about that.

In our Constitution it says no person shall be derived (sic) of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.

Now, that's the state Constitution – or that's the – our nation's Constitution. I'll read just a line or two out of the state's Constitution: Private property shall not be taken for public use or damaged without just compensation. Those are our two Constitutions that we set the laws by, our national [13] Constitution and our state Constitution. I was – I would submit to you, ladies and gentlemen, that that is exactly what we're doing. We're taking constitutional rights away from the people of South Dakota.

When we heard this bill in committee the prime sponsor came to the podium during rebuttal – rebuttal time and told us that the law, as it existed, was not enforceable. He went on to say if we passed this bill, it will still be not enforceable. So I submit to you, Why should we pass this? It's not disputed that this is a taking of property owners' rights. I have yet to hear one person, proponent or opponent, submit that this is not a taking of property owners' rights.

It's been – it's been testified that we need to do this to bring the two groups closer together, the hunters and the property owners. I would suggest to you that this bill will do exactly the opposite. When you continue to chisel away at the property owners' rights, you're going to drive a

wedge between the property owners and the hunters and do exactly what you've set out to do. Let's defeat this bill. Thank you.

MR. SPEAKER: Further remarks from Senator Hundstad.

SENATOR HUNDSTAD: Thank you, Mr. Speaker.

I want to just read you a few words from the [14] Supreme Court decision that was handed down that brought this bill to us today: Additionally, a trespass may be committed on, beneath, or above the surface of the earth, with the exception of flight by an aircraft. I say today, if we pass this as its worded, that we're going to be passing a bill that's absolutely unconstitutional.

Now, I've been assured when I went to LRC that we do this quite regularly. But I warn you that as we go at this, we are going to be passing a law that is unconstitutional, and I hope you can resist doing this.

MR. SPEAKER: Further remarks?

Representative Lintz?

REPRESENTATIVE LINTZ: Thank you, Mr. Speaker.

You know, I hope the landowners of this state realize the attitudes that are prevalent anymore in this state amongst the lawmakers. Earlier in this session, we voted on a bill to limit the Game, Fish, and Parks from purchasing property. And I sat here and I listened to a lot of you say it's a wonderful thing that the government buys private property. And – so that we all have a place to hunt.

Now we're saying it's a wonderful thing that we don't care if the private property is there, we have the right to go onto it. And – where's it stop? I think the landowners of this state eventually are going [15] to have to form an alliance. If you want to take their rights away, like Representative Rhoden was saying, do it constitutionally. If you want to take the Constitution and say we no longer have landowner rights, why don't you go ahead and do that?

But what you're doing is you're driving a wedge between the landowners and hunters. And Representative Rhoden was very right. It's a joke, ladies and gentlemen, if you think that – if they take and take care of the trespass law.

If you've ever had a person trespass on your place and try to get somebody to arrest them and prosecute, it's almost impossible in this state. Now we want to give them the right to trespass with a gun, shoot, do anything they wish to do. And where does our landowner rights come in?

The truth is, ladies and gentlemen, we have a lot of hunters out there that couldn't care less about this law, because they're going to do it anyway. And we see that constantly. Nobody could care less about this law. I can guarantee you if a pheasant runs in front of somebody driving down a county road and it runs across somebody's pasture, nine out of ten cars are going to stop and shoot that thing whether there's a law there or not. And most of them don't care if there's a cow [16] standing there or a person standing there. Because if a person's standing there, they can still shoot. And that person can go and try to charge them with trespass. But when it comes down to it, he's going to have to identify exactly who had the gun, who shot, stand there in a court of law and say this guy

did it. And nine times out of ten, it's not even going to make it to court.

So I just think that we're going to have to revalue how we're treating the landowners in this state. And I encourage you to vote against this.

MR. SPEAKER: Further remarks?

Representative Sebert?

REPRESENTATIVE SEBERT: I'll make it very short. Thank you, Mr. Speaker.

In all, I guess when our forefathers plotted out this great land of ours, they allowed for public right-of-way, and that's exactly what we're talking about.

MR. SPEAKER: Further remarks? Does anybody wish to speak before Representative Rounds speaks a second time?

Representative Peterson?

REPRESENTATIVE PETERSON: Permission to address the bill?

MR. SPEAKER: Yes, sir.

[17] REPRESENTATIVE PETERSON: As a farmer who has many miles of roadside ditches, I want to tell you that not every farmer is against this bill. I realize that this is a hunting heritage that we have here in South Dakota, and I realize that hunting is very important to the economy of South Dakota. All you have to do is live along one of our major highways like I do – I live along Highway 212 – and before pheasant season opens, all night long there's a steady – steady stream of cars coming out of

Minnesota heading into South Dakota. So it's a very important industry.

And I don't mind people hunting my road ditches. And most of my neighbors don't either. And there are slob hunters, like people say. I've even quit deer hunting in my area because the first morning when I drive around I'll find pickups on every quarter, circling. But, still, that's no reason to destroy the hunting. I'd hate to see us do like North Dakota did and ban all road hunting. I've enjoyed hunting, my kids have enjoyed hunting, and I hope my grandchildren can too. Thank you.

MR. SPEAKER: Further remarks? Does anybody wish to speak before Representative Rounds speaks a second time?

Hearing none, Representative Rounds?

[18] REPRESENTATIVE ROUNDS: Thank you, Mr. Speaker.

Ladies and gentlemen, in the gallery tonight we have property owners, landowners, whose livelihood is made off the land. And that's something we have to respect. Also in the gallery tonight we have people who are road hunting – think road hunting is a heritage. Both of these parties want to work out some sort of agreement or compromise. We know this will keep coming back and coming back and coming back, or possibly end up on a referendum.

Let's give this bill a chance. Let's give these people a chance to talk, to negotiate to see what can be worked out. Let's pass this bill. Let's work on it some more. And I just hope we can come to a compromise. But let's pass this thing now. Thank you.

MR. SPEAKER: Further remarks?

Representative Juhnke?

REPRESENTATIVE JUHNKE: Thank you, Mr. Speaker. I have a question of Representative Frost.

MR. SPEAKER: Of Representative –

REPRESENTATIVE JUHNKE: Frost.

MR. SPEAKER: Frost. State your question, sir.

REPRESENTATIVE JUHNKE: Representative Frost, [19] when you were discussing this legislation, you said this was a compromise. What did the road hunters compromise in this agreement?

MR. SPEAKER: Representative Frost, do you wish to answer the question?

REPRESENTATIVE FROST: Would you repeat the question. I didn't hear it.

REPRESENTATIVE JUHNKE: When you were discussing this earlier, you said this is a – this bill was a compromise. And I – what was – that the road hunters compromised in coming to this agreement?

REPRESENTATIVE FROST: Well, I think the agreement was that they've sat down, they've talked about it. And I'm not sure the road hunters gave away anything, but – and I suppose that answers your question. But it's – it's a compromise of trying to come to an agreement that everybody is satisfied with here. And I think they've done that.

MR. SPEAKER: Representative Juhnke, you have the floor, sir.

REPRESENTATIVE JUHNKE: Yeah. Thank you.

Thank you, Representative Frost. I sat in on those meetings, the ones that I was invited to by Game, Fish, and Parks. They were monitored by Secretary Cooper and his staff, and they did an excellent job of trying to [20] bring two – two emotionally charged groups together. Senator Koskan headed up, really, our side. But there were several senators that were involved in this and a few of us on the House side.

But it was really more, How can we defuse the emotionalism of this? And I don't know if we've done it. I stayed on this bill till this – just two days ago. I was in support of it. I thought the drafting of it was coming along well until I realized that there is no way with the – two nights before the – the committee hearing when all the property rights issues came before us.

And the reason I was staying on it was because of the safety issue. I live in District 26 as – which covers Tripp, Lyman, Mellette, Jones, Jackson, you know, basically from Oklahoma to the Phillip (phonetic) area, which is big for – for road hunting and the pheasant industry, if you want to call it the – industry.

So this is very near and dear to my heart. And is there a right answer? No. And I said this at the committee hearing and I said it in caucus earlier: To do nothing is wrong; to do this is maybe just one notch above that, because this is not anything but chiseling away.

Representative Rhoden did a good – [21] Representative Lintz has really – alluded to it really well. The only one that's giving up anything in this fight, in this discussion, in

this negotiated agreement, this compromise, whatever term you want to use it – with 1163, I feel is – are the landowners. We did get a little safety. You know, there is – we're giving them the right to break two other laws: We have two laws on statute right now in our law books that you cannot stop on a rural highway and a second one that you cannot open the left-hand doors.

So, now, in this legislation, we're going to give them the authority to do that. And Representative Hun – Hundstad is probably right, we often come up here and legislate and pass laws that are unconstitutional and that override preceding statutes. Are we going to get closer together with this? Probably. Can you legislate ethics? Never.

So I hope we can – you know, vote your conscience on this. That's always what you hear this – this crossover day. But, as honest people, we need to put this to rest, and we need to put it to rest now, so I hope you can vote to kill this bill.

REPRESENTATIVE LANGE: Mr. Speaker?

MR. SPEAKER: Further remarks? Representative Lange?

[22] REPRESENTATIVE LANGE: Thank you, Mr. Speaker and members of the body.

I, too, own land and I have the attitude that Representative Thompson has – or Representative Peterson back there. Every time I see a vehicle going by, I say, Good, they're helping to pay the gas tax and they're helping to pay the road tax, because – and they buy shells, and they buy – buy meals in town. And I look at it as an economic development thing. And if you eliminate this, you're going

to see a drastic dop – drop in licenses in my area, because there are a bunch of people who don't walk very well and they do a lot of road hunting. They don't get much, but they do a lot of road hunting.

So I would support the bill, and let's go home.

MR. SPEAKER: Further remarks? Representative Hunhoff?

REPRESENTATIVE HUNHOFF: Thank you, Mr. Speaker.

First of all, I want to say thank you to the landowners here for at least participating in this. As a hunter and a nonlandowner, it – it is stressful to me, and I know as property owners you certainly have the right.

[23] You know, I sit here and I was thinking: hunting, healthcare. Both with Hs. Both involve children and adults. And the bottom line is access and affordability. And that's what's happening. We don't have the access and the affordability. I would hope that if there is some hope for this bill that it can get some revision if we could pass it out of this House over to the Senate and see if there could be some improvements there, that we create a partnership.

All I can say is this: My family, we live here 365 days of the year. We will continue to pay our taxes which help to provide good roads to places in your communities where there's hunting opportunities. Also to provide for economic development so your communities can get businesses to respond to hunters and those needs. We'll continue to do that. But you know what, I won't be able to go hunting with my kids anymore, because it's just become inaccessible and unaffordable. Thank you.

MR. SPEAKER: Further remarks?

Representative Rhoden?

REPRESENTATIVE RHODEN: Mr. Speaker, thank you.

I just wanted to make a point of clarification regarding my testimony. I referred to the prime sponsor in regard to comments that were made at committee, and I [24] wanted to clarify that I was talking about the prime sponsor from the Senate and not Representative Bill Peterson. Thank you.

MR. SPEAKER: Further remarks?

Hearing no further remarks, the question for the House of Representatives, therefore, is final passage of House Bill 1163.

Those in favor will vote aye. Those opposed, nay. The clerk will unlock the voting machine. The members will please proceed to vote on final passage of House Bill 1163.

(There was a pause in the proceedings.)

THE CLERK: Representative Hundstad?

(There was a pause in the proceedings.)

All members present have voted.

MR. SPEAKER: Thank you. The clerk will display the vote.

THE CLERK: Mr. Speaker, there were yeas 54, nays 15, excused 1.

MR. SPEAKER: House Bill 1163, having received majority vote of the members elected, hereby declared passed.

(There was a gavel banged.)

MR. SPEAKER: Are there any questions on the title?

[25] Hearing none, the title is deemed approved.

(The proceedings were concluded.)

[26] REPORTER'S CERTIFICATE

I, Cheryl M. Robinson, Professional Shorthand Reporter and Notary Public in and for the State of Colorado, do hereby certify that I have listened to and transcribed one proceeding entitled House of Representatives Motion to amend Passed H.J. 582 Amendment (1163tb). I certify that this transcript is a true and correct transcription to the best of my knowledge and ability.

Dated the 17th day of April, 2006.

/s/ Cheryl H. Robinson
Professional Shorthand Reporter
and Notary Public

TRANSCRIPTION

RE: House Bill 1163, House of Representatives Motion to Amend, Passed H.J. 582 Amendment (1163tb), 02/22/2003

The original transcript in the above-named matter was delivered to JOSEPH F. BECKER, Esq., on approximately APRIL 17, 2006.

Dated at Aurora, Colorado, this 17th day of April, 2006.

Original: Attached to original transcript

TRANSCRIPTION

HOUSE BILL 1163

SENATE DO PASS AMENDED PASSED,

YEAS 19, NAYS 16 S.J. 672

03/03/2003

[2] (The following proceedings were had:)

MR. PRESIDENT: Senator Bogue?

SENATOR BOGUE: Mr. President, at this time I would move that we take immediate action on House Bill 1163, move it up the calendar.

MR. PRESIDENT: Is there a second?

UNIDENTIFIED SPEAKERS: (Inaudible.)

MR. PRESIDENT: The Bogue motion is to move House Bill 1163 up the calendar for immediate consideration. Are there any remarks?

SENATOR McCRACKEN: Mr. President.

MR. PRESIDENT: Senator McCracken?

SENATOR McCRACKEN: Thank you, Mr. President.

Ladies and gentlemen of the Senate, I guess I would start today –

MR. PRESIDENT: Excuse me –

SENATOR McCRACKEN: – by asking you what –

MR. PRESIDENT: Excuse me. Senator McCracken, I'm sorry. The remarks would be on the motion to move it up the calendar.

Hearing none, all of those in favor of moving it up the calendar say aye.

UNIDENTIFIED SPEAKERS: Aye.

MR. PRESIDENT: Those opposed no.

UNIDENTIFIED SPEAKER: No.

[3] MR. PRESIDENT: Motion carried.

(There was a gavel banged.)

THE SECRETARY: House Bill 1163, an Act to revise certain provisions relating to hunting and public right-of-ways.

MR. PRESIDENT: Is there a second?

UNIDENTIFIED SPEAKER: (Inaudible.)

MR. PRESIDENT: House Bill 1163, having had its second reading is now up for final consideration. Are there any remarks?

SENATOR McCRACKEN: Mr. President.

MR. PRESIDENT: Senator McCracken.

SENATOR McCRACKEN: Thank you, Mr. President.

Ladies and gentlemen of the Senate, House Bill 1163. I think I would start by asking you what happened to the good old days. I was born and raised on a small community in the eastern part of South Dakota; and I have walked many, many road ditches, along with the dog, hunting pheasants back in those days. And there was probably a farm every half mile or every mile along – in those particular days. And, now you go walk – walk along the road ditch

and there might be a farm or ranch every two miles, maybe every three miles.

So why did we get to this process today? I think over time things have evolved, and we have to bring [4] House Bill 1163 before you today.

There's been a lot of compromise. There's been a lot of work has went into this particular piece of legislation, and I'd just like to share some things with you.

One of the things it talks about is the shooting or taking by legal methods anything that's within the 66-foot right-of-way, or the – or particularly the right-of-way. If you're walking down through the ditch, you have a – there's a 66-foot of right-of-way; and any small game animal that would get up from that particular area, you would have the right to shoot at that.

There's also been a safety factor – a safety zone that's been imp – put into this bill. It talks about a 666 (sic)-foot safety zone. And that surrounds the dwelling and – the farm place and the dwelling. It used to be you could actually shoot it, like an angle.

If the bird got up and was going towards the house or the barn, you could actually shoot through there. Now it talks about a safety zone that surrounds the occupied dwelling, church, schoolhouse, or livestock.

It also – it's the intent of the legislature that hunting from the highways and public right-of-ways, that you would pull the vehicle over to the side, you [5] would stop the vehicle, get out, shut the doors, the engine would be shut off, and then you'd start walking down to the road ditch to hunt the – to hunt the wily pheasant.

It also states in there that any person who, while hunting road right-of-way recklessly or negligently, endangers another person or puts that person in fear of imminent serious bodily harm is guilty of a Class 1 misdemeanor.

Ladies and gentlemen of the Senate, if we do not pass this bill today, House Bill 1163, I firmly believe that this is going to wind up on the ballot. It's been a long, hard road to bring everybody together to reach some sort of a compromise on this bill, and we're here today. And I'm here to ask for your support of House Bill 1163. Thank you.

MR. PRESIDENT: Further remarks?

Senator Dietrich?

SENATOR DIETRICH: I have a question of the sponsor.

MR. PRESIDENT: State your question.

SENATOR DIETRICH: Senator McCracken, you just told us that if we didn't pass 1163 today that we would probably have a referendum. Is there – is there something that's happened or changed recently that would [6] lead you to believe that? Or could you help me out with that?

MR. PRESIDENT: Senator McCracken, do you wish to respond?

SENATOR McCRACKEN: Yes, I do, Mr. President.

Thank you for the question, Senator Dietrich. I believe that there was an incident that involved a court case earlier this year or last year that has prompted to bring this forward, and it's sad that this had to happen. It's too

bad there can't be more cooperation between the sportsman and the landowner. And I say "sportsman," Senator Dietrich, because there's a big difference between a sportsman and a hunter. And I think that's the reason we're here today, Senator Dietrich.

SENATOR DIETRICH: Mr. President, if I might ask a follow-up question?

MR. PRESIDENT: Yes, you may.

SENATOR DIETRICH: Was there a policy change based upon the court case decision?

MR. PRESIDENT: Senator McCracken, do you wish to respond?

SENATOR McCRACKEN: Yes, I do.

Thanks, Senator Dietrich – Dietrich. To my knowledge, there's not been a policy change regarding [7] this particular issue that you're talking about. But the – I believe the litigation that was involved has prompted this – to bring this forward today, Senator Dietrich.

MR. PRESIDENT: Senator Dietrich, you have the floor.

SENATOR DIETRICH: Thank you, Mr. President.

Thank you, Senator McCracken, for those answers. I appreciate that. And he is very (inaudible). I mean, that's one of the things that I really – I don't know if I'd say disappointed me or what, but I had several hunters/sportsmen that came into my office and explained to me – it was within the first week or two of session – how, because of this Supreme Court ruling, we have changed

the policy of how we can road hunt pheasants and/or other small game.

When I visited with the Game, Fish, and Parks and you pull out their manual, it says very clearly what the policy is. And that policy is exactly how the Supreme Court ruled in their decision. That policy didn't just happen last year in the 2002 manual. That policy has been there for at least fifteen years.

And so that's why I ask, Well, why, all of a sudden this year, do we have to have this done or should we make this change? Because, of course, their response [8] on why we need the bill was – is that the Supreme Court narrowed up our ability to hunt – to road hunt, and we want to expand it back to where it was.

Well, in fact, ladies and gentlemen, this bill before you expands road hunting quite a bit. It expands it to the point where now you are able to – if we pass this bill, you will be able to shoot pheasants over private property. And I think there's pretty good – a pretty good line of court case and so on behind us that explains that that area above the ground is the property of the owner as well as that that's below the ground.

And so we can debate whether this is good policy or not. We can debate whether it's constitutional or not. But I think there is very little debate as to whether there's a takings issue here or not. I think there's little doubt about that.

But, certainly, if we pass this bill, there will be a takings issue. And somebody will have to – will have to repay the landowner for the use of their land, whether that's the State; whether it's the Game, Fish, and Parks;

or whether it's the person that's out there shooting the bird.

I think we have a lot – we had a great discussion on this in ag committee. And there were a number of people that came in, landowners, that talked [9] one after another about their concerns from a safety perspective.

And I understand there is a safety zone, Senator McCracken. But the fact is, is that if you were – basically only had that 66-foot wide in front of you to hunt in, to shoot in, that's a whole lot different situation than when, all of a sudden, you can point and go over private property to shoot at birds.

There are situations – our farmers, many farms – during that time of year during pheasant season, we have a drain system. And that drain system's not located next to the house, because if it was located next to the house, you wouldn't get any sleep for two months. So we locate those aways away from the house. And if that's 3- or 400 foot away, that 660 foot is actually only a couple of hundred foot away from the area that we work in, because that 660 is – is the distance between the house and that point that they're shooting the pheasants. And so I would say there's a definite – a definite – a very serious safety issue that we have involved with this.

I would just ask this body for a number of reasons: One, I don't believe that there's been a change. I think that people will still have the same ability they've had in the past to hunt. I think we have [10] the property – the property issue in front of us. For several issues, we ought to keep it the way it is.

And that's coming from a guy that has let anybody that's asked to hunt on my land hunt, who's never had a problem with somebody that's in the road ditch shooting a pheasant over my property.

But I think there's a big difference as to whether I have a problem with somebody shooting a pheasant over my property versus if I don't want that individual to hunt for various other reasons, that I am forced to give him that privilege to shoot that bird over my property. I think that's a serious problem.

With that, I would ask this body to kill this bill.

MR. PRESIDENT: Further remarks?

Senator Koskan?

SENATOR KOSKAN: Thank you, Mr. President.

Members of the Senate, I would like to start out by giving just a little bit of history of where we – where we've come in South Dakota and why we're here today. And – and I can't explain all of the things that have happened, but I can tell you that our state has changed. We've gone from a rural state where everybody had access – or most everybody had access to hunting, to a state where – where it is limited now.

[11] We have more out-of-state hunter interest, more out-of-state pressure to – to look for places to hunt. We also have commercialization where people are trying to protect their – their livelihood by subsidizing, if you will, the farm income.

As you know, last fall the Supreme Court ruled, correctly, that – and basically made the statement –

reiterate it so everybody's clear and it – it just accentuated the issue that – that the place that was legal to hunt was in between the fences, between the 66-foot right-of-way. And that really just started the debate again about what – where we want to go in South Dakota.

And there were – in the paper there was issued statements that there was going to be bills brought in. The first week that we were here we started to work on this issue with a big group. We worked with Game, Fish, and Parks; we worked with the Wildlife Federation; we worked with – and I'll name them so I know – so you know that – who was here at the table: It was the ag groups; it was the Stock Growers; the Cattlemen's Farm Bureau; South Dakota Wheat; most of Ag Unity, I think, actually was there; Senator – or Senator Duenwald; Representative Juhnke; myself. We were all there and we thought, This is an opportunity to make [12] changes in our hunting laws in South Dakota. Because if you live down in the area where I live, it's an issue. It's a huge issue. People have said, We don't like the way things are going. And we thought this was an opportunity. They think that people driving around in cars shooting at birds is a dangerous sport that we have. We had a fatality south of Winner last year, and it was due to road hunting, specifically.

And so this – this is a big safety issue. We worked through the session. We had meetings continually with the groups and we drafted the bill, dropped it in.

After that happened, there started to be some changes. And I don't mean to endorse or say that anybody in any of those groups endorse this bill, because they do not. But they originally wanted to make some changes in the bill – in hunting in South Dakota.

The amendments – the changes that are in the bill – the bill itself, I do believe provide a lot of those things that the landowners have been asking for. It does start to change the way hunting is done in South Dakota. It takes down the big billboard at the state line that says, Come drive around and shoot our birds. It changes it to say you can shoot our birds – shoot our birds, but you have to walk.

It does increase – like Senator McCracken [13] said, it changes the safety zone to make sure it's clear around homes. It increases the penalty for those that are shooting in the yards and endangering people. It does those things. But it does not address – it does not address property rights. And I don't know how to fix that, because if I did, I would.

Every time that we've talked about this bill, (inaudible), we talked about safety and hunter relations, and I think this bill does go a long ways towards that.

I have worked – we've worked with the Wildlife Federation, and I – and I just want to commend them, because at this point I have had many calls with my constituents and there is, without – just one or two exceptions, opposition to this bill because of the landowner rights issue.

I'm going to vote against the bill, but I think that the people that have negotiated this – this proposal have done due diligence. I would like to thank Chris Hasla (phonetic) and Dave Nowman (phonetic) of the Wildlife Federation, because I asked after we kind of decided that this – there wasn't the landowners' support, I said, Is there anything you would like to take out of the bill to get the bill back to the bill that you would like to see? And they said this is

the one they want. And I commend them for that. They realize the [14] safety issue. They realize that the – the ethics of the hunting that we have in South Dakota. And I can only highly commend them for sticking to their guns and saying, This is the way that we would like the changes made.

In conclusion, I do believe it's a – it makes hunting safer. I think it makes relations better, but I can tell you, whether this bill passes or fails, a lot of how hunting is going to be done in South Dakota – the acceptance of hunting – is going to be in enforcement. This is one issue I have heard continually from the very beginning to the very end, is we're not enforcing the laws we have. And that's a big issue.

I'm going to challenge Game, Fish, and Parks to go out and start making those – listening to those complaints from the landowners and from the sportsmen in this case, that they need to get out there and really take an interest in developing this sport into something that both sides can live with.

I guess – that's my concluding remarks. I think we have – we have to make changes in South Dakota to improve that, and I just thank the – thank the body.

MR. PRESIDENT: Further remarks?

Senator Kooistra?

SENATOR KOOISTRA: Thank you, Mr. President.

[15] Members of the body, I sat in committee also, and I strongly support House Bill 1163. I'm a road hunter myself and I understand the landowners' rights. Most of us

grew up in a rural – in a farm area, but I can speak on behalf of the elderly and those that've got limited – disabilities, myself a disabled Veteran, we enjoy road hunting. We do a good job at it. The majority. Not everyone can afford to go west of Mitchell (phonetic) area and pay 20 to $30 to some of these farmers (inaudible). Many of us have jobs in the eastern part and after work it's nice to go out for about an hour and do some road hunting.

And many of the people in that area, they belong to your gun clubs; they go out to the shooting range. Many of our Veterans are very good with firearms, and they practice the safety. And then they want to use those skills, going out and getting – or game.

We talked about the landowners' rights, their protection, et cetera. And I can tell you also as a Veteran, those that have fought for our country, well, we want to protect some of those rights. And one of those is that right that we should have the right to bear arms, et cetera. That's a whole new ball game. But the right to go out there and to road hunt – again, we have to pass this.

[16] And the safety issue, it has been addressed, and these people will. They're not all the slob hunters that you're going to find. You're going to find the same people, the slobs, there after the Fourth of July. They go into your rural township roads and leave a mess. What we have here is good bill, and it should be passed. It is a good compromise. I ask for your support. Thank you.

SENATOR SIMMONS: Further remarks, Mr. President.

MR. PRESIDENT: Senator Simmons.

SENATOR SIMMONS: Thank you, Mr. President. I've got a question for Senator Kooistra, if I may?

MR. PRESIDENT: State your question.

SENATOR SIMMONS: Senator Kooistra, do you think that this bill has any aspects of constitutionality in it, when the bill in its specific editions says that you can shoot over private land?

MR. PRESIDENT: Senator Kooistra, please.

SENATOR KOOISTRA: Specifically, I would (inaudible). I made my comments on constitutionality. I've dealt with the constitutionality of the landowners' rights versus the right, such as myself, to road hunt. That's what I was referring to, Senator Simmons.

[17] SENATOR SIMMONS: I understand that, but that's not the answer to the question.

Do you think, Senator Kooistra, that in this bill, we are basically taking the constitutional rights away from the landowner when we say that a hunter may shoot into that land without permission?

SENATOR KOOISTRA: If I may, Mr. President?

MR. PRESIDENT: Yes, Senator Kooistra.

SENATOR KOOISTRA: Senator, I would think that that's what the courts would have to decide. And they have decided also. But I think we also have to make a statement here also, and that's what we're doing with this bill.

SENATOR SIMMONS: If I may –

MR. PRESIDENT: Senator Simmons, you have the floor.

SENATOR SIMMONS: Thank you.

Senator Kooistra, then is this bill – from what I just hear from your response – is this bill not, then, a bill to take this to the court on the constitutional issue, rather than a bill on the issue of hunting the roadway?

SENATOR KOOISTRA: If I may? I would say it's to clarify. And then we bring up the safety issue. That's what it's doing, Senator Simons (sic). It's the [18] safety that's involved with this. And this is a compromise. I'm not arguing that – a court order on it. I didn't say the constitutionality of that. I'm not arguing whether its constitutional or not.

SENATOR SIMMONS: Thank you, Senator Kooistra.

If I may continue, Mr. President?

MR. PRESIDENT: That's granted.

SENATOR SIMMONS: A lot of people have asked me to vote for this bill. And in light of looking at the Constitution and private property rights, I have a real problem with that. Number one, I took an oath to uphold the Constitution. The Constitution basically forbids me to vote for this, because the Constitution says that private property rights are sacrosanct. And it really does.

If we look at – at all of the courts' responses on this issue, they are, all the way down the line, the same response: When it comes to private property rights, you have to have permission to use them. This bill is saying you

don't have to have permission anymore. You can just go ahead and shoot across that line if that game originates in the road right-of-way. And that's what this bill says. That is contradictory to all of the court cases on private property rights.

The fact remains, there is a court case now [19] being appealed to the Supreme Court on flooded property rights. The judge in the original case said that you cannot enter flooded property as has been promoted by Game and Fish over the years; that if you could put a boat on or wade in – on the water – if you could put a boat on that water without accessing dry land, you could go ahead and use that. The courts have said, No, you can't; that flooded land is private property when it has a deed to it and is held by a private person.

That is really the issue on – on all of the rules in the hunting guides. The very fact that you can shoot over that right-of-way, but you can't shoot across the property line. That's law. That's rule. That is Constitution.

And I would even go so far – and, of course, I'm not a lawyer like many of those sitting here – but I would go so far that even if the State changed the Constitution to allow this, you would still have the constitutional issue of private property rights under the federal Constitution. That's an old body of law that is very constant in all of the rulings: Private property rights are private property rights, and the government cannot give them away.

I would maintain that if we pass this bill – the purpose of passing this bill is to make sure that the [20] State pays the bill for the appeal to the Supreme Court and further on up the line if it would go there on the private property rights issue, rather than those who want to hunt

on private land without permission. And that's exactly what this bill says. You are giving them the right to hunt over private property without the landowners' permission. It doesn't say anything else. That's all it says.

And when you do that, you're inviting a court case, which this bill will do, and inviting the State to pay for that process, rather than those who want that right to hunt.

This is a serious issue. And under today's Constitution, I think this bill will be declared unconstitutional because of what it says and how it says it.

We can't, as a legislature, give those rights away under the Constitution. I would hope that you would defeat the bill. I would hope that the hunter/landowner relationships continue to improve. The only way that will happen is with communication, not this bill. The only way that will happen is everybody understands whose rights are whose, and then communicate to ask.

I have never refused anybody the right to hunt on my land, other than at times if there's livestock out [21] there or something else. We believe in open hunting. We don't have a problem with that. I've never worried about the road hunting issue. Most of the time, though, if you're going to do road hunting, we'd have to change some other laws that have to do with uncased guns in vehicles and loaded guns in vehicles and all the other issues that are there, because those are against the law too.

So there's more than this that embodies the road hunting issue. But this particular bill, I would maintain, is unconstitutional; and we need to vote against it.

Thank you, Mr. Chairman – Mr. President.

MR. PRESIDENT: Senator Schoenbeck?

SENATOR SCHOENBECK: Question for Senator Simmons, please.

MR. PRESIDENT: State your question.

SENATOR SCHOENBECK: Senator Simmons, you know, currently the legislature says you can have unarmed retrieval. Do you believe that law's unconstitutional also?

SENATOR SIMMONS: If I may, Mr. President?

MR. PRESIDENT: Senator Simmons.

SENATOR SIMMONS: I would maintain that without permission it would be unconstitutional, because that is what the Constitution says, and that is what our [22] laws say: permission. Once you receive permission, you can do whatever you want to do with that permission on that land. But the landowner still has that right to give you permission. And all of the Constitution says that.

MR. PRESIDENT: Senator Schoenbeck, you have the floor.

SENATOR SCHOENBECK: Thank you.

Well, see, now there's the problem. Our courts – and the reason why everybody's say – first, let me say, you know, I always tell young lawyers when they get elected to the legislature, Don't be saying it's unconstitutional, because you're going to make every rancher mad. They'll always – they'll vote against you every time some lawyer says it's unconstitutional. I don't know what you do when the ranchers say it's unconstitutional.

But – but I did note that everybody that said it was unconstitutional and that there were a lot of cases on that, didn't mention any. And there's a pretty good reason why. That has never been the law in South Dakota. In fact, the recent decision references the 1992 Attorney General's decision, both of them noting that that legislature defines what is a trespass that's okay, and what is one that is not okay.

[23] That's what it says in the decision. They didn't say it's unconstitutional. They said that this body has the right to make that decision.

And the purpose for this bill is not to create a lawsuit, although there are some – and I don't suspect that they're going to come from the hunting crowd – that are going to make a lawsuit out of this bill, I suspect. The purpose of this bill is to define the rights. And that's what it does.

Now, I feel bad for Senator Koskan because, you know, a prophet isn't recognized in his own land. This bill is not a good road hunting bill. For road hunters – when my buddies figure out what these restrictions mean, there's a whole lot of folks that are road hunting are going to find out they aren't going to be doing it anymore, or they're not going to do it the way they do it.

This severely restricts road hunting as most of us know it – you know what – and that's probably a good thing. I think the bill – in fact, I suspect a whole lot of folks don't like what goes on out in your country. This bill's enforced, they're going to see a lot less of it, because you can't be jumping out of the car and blazing away. And that's what your bill restricts, and I think that's what a lot of guys like to [24] do.

So I think your bill's a good bill – well, it's not your bill, excuse me – but I think the bill is a good bill, because it – it improves the quality of the practice of road hunting and it defines the property right.

And so I would encourage you to pass the bill.

MR. PRESIDENT: Further remarks?

Senator Dennert?

SENATOR DENNERT: Thank you, Mr. President.

While a lot of discussion has been going on on [sic] House Bill 1163 today, I could read you letters from people that I've got about road hunting or road shooting. And I've had calls both ways on this. But if I would, Mr. President, I have a question of Senator Koskan.

MR. PRESIDENT: State your question.

SENATOR DENNERT: Senator Koskan, you mentioned something about hoping that GF&P follows up on the complaints on this issue if this bill is passed. I was just kind of curious, Senator Koskan, how many complaints you think there will be if this bill passes? Because to me it just about gives the road hunter about a green light to do whatever he wants when he's hunting. How would you feel that a farmer would have a complaint on this issue?

[25] MR. PRESIDENT: Senator Dennert, according to the rules, you – questions may not be addressed to ask another member's opinion on something unless it relates to the subject matter of the bill.

SENATOR DENNERT: Well, Senator Koskan, then, the question would be: As me as a landowner, how would I ever file a complaint against a road hunter if this bill passes?

MR. PRESIDENT: Senator Koskan, do you wish to respond?

SENATOR KOSKAN: I have tried to understand the question, but there's some provisions in – especially in Section 3 that you need to read. It's assault language – it's out of the current assault language. And we put it into the – it was put into the road hunting section of the bill. And it says that recklessly or negatively endangers another person or puts that fear – puts that person in fear of imminent serious bodily harm. And that's – about, I think, is a big improvement in our safety – in our – in our safety in hunting.

And how that's proved is by evidence. If I, for example, have had my – I go out bicycling every day until the opening season, and then I don't; or I don't allow my children to go out after the hunting season [26] begins because there's hunters there, I think that is enough proof to go to court. And the reason that it makes – it's easier to do it is because we put it in the road hunting statute. We say, If you endanger while road hunting. Now we have those two together, and it makes it easier to prove the case of an assault.

I'm not sure if that answers your question. You still have to prove it, I guess – maybe the short answer is you have to prove it. But at least you have something to try to prove.

MR. PRESIDENT: Senator Dennert, you have the floor.

SENATOR DENNERT: Thank you, Senator Koskan. Well, that addressed the issue of the safety zone, but I still think that we're going to have the problem of still addressing where the bird originated from and whose word is taken and whose – and I just feel if this bill passes that our conservation officers will have no legitimate stand whatsoever to prove that a road hunter had shot at a bird whether it originated or didn't originate from the road right-of-way.

For that main reason, at this time, and all the other things, I would urge the defeat of 1163.

MR. PRESIDENT: Further remarks?

Senator Duenwald?

[27] SENATOR DUENWALD: Mr. President, members of the Senate, I don't know if I'm going to add a lot to the discussion that's been going on. I've got a lot of good friends on both sides of this issue. And Senator Koskan is absolutely right when he said we started out, a lot of people got together to look for a compromise, because we do need to have hunting in South Dakota. It's vitally important. It's a big industry. It makes a lot of kids happy, a lot of people happy. It's a good – it's just a good sport.

But when you vote on this bill, I want you to consider very carefully what you're voting on. I don't think it does a lot for safety. I'll tell you why: Because it doesn't protect my grandchildren who are playing in my yard. 660 feet from a dwelling, but it's not from the kids that are out 500 feet away or 800 feet away. Farmyards are – have grown over the – over the years. They're not like we used to think

of them when we used to think of a small – when we say a small family farm, just a little – it's considerably different – and kids wander; grandchildren wander; children wander. And it doesn't protect them at all.

Modern ammunition shoots a lot more than 660 feet. It can kill a bird at 300 feet. That's lethal. 600 feet – 800 feet you'll take an eye out. And that's [28] what I'm worried about. I'm not worried about killing the grandchildren. I'm worried about their eyes.

You know, it started out, we were looking for a compromise. I don't think we ended up there. We didn't do a lot for the safety for the farmer. We didn't do anything, in fact. A little bit, but not much.

And property rights, this is where I'm concerned. I – I – I don't believe it's constitutional, but I don't know that. And that would go for a court test. But let's assume that it is. Assume that it's constitutional and it will stand up in court if this bill would take effect. Then I want you to consider what you're doing. A property right or ownership is the ability of the owner to enjoy their property at the exclusion of others. If this bill is enacted and is upheld, we here have given away from the property owners one-eighth of their property. The right to enjoy that at the exclusion of others will be – if you can shoot into the land the distance, 50 yards, and it's about 20 acres to a quarter section, or 80 acres on 640, that's about one-eighth. And I don't know what the value of that is, but I think it's considerable, and I think it's more than we should be – be doing at this time. And I would strongly urge you to defeat the bill. Thank you.

MR. PRESIDENT: Further remarks?

[29] Senator Simmons?

SENATOR SIMMONS: Thank you, Mr. President.

Senator Schoenbeck talked about the issues that have not been there on constitutional issues, and I would agree with him. They have not been decided, quote, on constitutional issues. That's what I believe this bill is designed to do. Because what other issue are you going to take from the landowners' perspective, other than the takings of property. which is the constitutional issue? It is a takings. That's flat where it comes down. Nowhere else. We may say the laws will let you shoot there. And we may say the laws will let you retrieve there on unarmed retrieval. But the fact is, without permission it's still a takings of the property owners' rights. And there's no other way you can interpret it.

This bill in court will be fought on the constitutional issues and no other, because that's what it's designed to do. It may be a good process, then – who – then we would have that answer of what the constitutional issue is. But I don't think this is the way to go about doing that. And I would hope that you defeat the bill.

MR. PRESIDENT: Does any member wish to speak before Senator McCracken speaks again?

[30] Senator McCracken, you have the floor.

SENATOR McCRACKEN: Thank you, Mr. President.

Ladies and gentlemen of the Senate, we have had a very good debate this afternoon on House Bill 1163. I would just like to emphasize that walking down through a

road ditch in a 66-foot right-of-way and the small game animal that doesn't – gets up out of there, that the sportsman would have the opportunity to shoot at that pheasant, even though it might traverse across the plane of the 66-foot right-of-way outside of that.

I guess I would just ask you a question connected with that: How high does that go? I mean, does an airplane flying over the land? I mean, you've got to think about that for a minute. Is that – is that part of the process?

Ladies and gentlemen, we have had a great debate, and I would ask for your support on House Bill 1163. Thank you.

MR. PRESIDENT: Senator Rogue?

SENATOR ROGUE: Mr. President, I would call the previous question.

MR. PRESIDENT: (Inaudible.) Moved and seconded to call the question. All in favor of calling the question say aye.

UNIDENTIFIED SPEAKERS: Aye.

[31] MR. PRESIDENT: Those opposed no.

UNIDENTIFIED SPEAKERS: No.

MR. PRESIDENT: The question has been called.

The question before the Senate is final consideration of House Bill 1163. As your name is called, those in favor say aye, those opposed no. The secretary will call the role.

THE SECRETARY: Senator Abdallah?

SENATOR ABDALLAH: Aye.

THE SECRETARY: Elders (phonetic)?

SENATOR ELDERS: No.

THE SECRETARY: Apa?

SENATOR APA: No.

THE SECRETARY: Bogue?

SENATOR ROGUE [sic]: No.

THE SECRETARY: Brown?

SENATOR BROWN: Aye.

THE SECRETARY: Hewig (phonetic)?

SENATOR HEWIG: Aye.

THE SECRETARY: Dempster?

SENATOR DEMPSTER: Aye.

THE SECRETARY: Dennert?

SENATOR DENNERT: No.

THE SECRETARY: Dietrich?

SENATOR DIETRICH: No.

[32] THE SECRETARY: Duenwald?

SENATOR DUENWALD: No.

THE SECRETARY: Duniphan?

SENATOR DUNIPHAN: Aye.

THE SECRETARY: Duxbery (phonetic)?

SENATOR DUXBERY: (Inaudible.)

THE SECRETARY: Earley?

SENATOR EARLEY: Aye.

THE SECRETARY: Greenfield?

SENATOR GREENFIELD: Aye.

THE SECRETARY: Hamm (phonetic)?

SENATOR HAMM: (Inaudible.)

THE SECRETARY: Jaspers?

SENATOR JASPERS: (Inaudible.)

THE SECRETARY: Kelly?

SENATOR KELLY: Aye.

THE SECRETARY: Levin (phonetic)?

SENATOR LEVIN: (Inaudible.)

THE SECRETARY: Kloucek?

SENATOR KLOUCEK: Aye.

THE SECRETARY: Knudson?

SENATOR KNUDSON: Aye.

THE SECRETARY: Koetzle?

SENATOR KOETZLE: Aye.

THE SECRETARY: Kooistra?

[33] SENATOR KOOISTRA: Aye.

THE SECRETARY: Koskan?

SENATOR KOSKAN: No.

THE SECRETARY: LaPoint?

SENATOR LaPOINT: No.

THE SECRETARY: McCracken?

SENATOR McCRACKEN: Aye.

THE SECRETARY: Moore?

SENATOR MOORE: Aye.

THE SECRETARY: Nackukel (phonetic)?

SENATOR NACKUKEL: No.

THE SECRETARY: Napoli?

SENATOR NAPOLI: No.

THE SECRETARY: Olson?

SENATOR NAPOLI: No.

THE SECRETARY: Rudy (phonetic)?

SENATOR RUDY: Aye.

THE SECRETARY: Schoenbeck?

SENATOR SCHOENBECK: Aye.

THE SECRETARY: Sutton, Dan?

SENATOR DAN SUTTON: Aye.

THE SECRETARY: Sutton, Duane?

SENATOR DUANE SUTTON: Aye.

THE SECRETARY: Simmons?

SENATOR SIMMONS: No.

[34] THE SECRETARY: Vitter (phonetic)?

SENATOR VITTER: No.

THE SECRETARY: Mr. President, ayes 19, nays 16.

MR. PRESIDENT: House Bill 1163, having received a majority vote of the members elect, is declared passed.

(There was a gavel banged.)

MR. PRESIDENT: Are there questions on the title?

Hearing none, the title is deemed correct.

(The proceedings were concluded.)

[35] REPORTER'S CERTIFICATE

I, Cheryl M. Robinson, Professional Shorthand Reporter and Notary Public in and for the State of Colorado, do hereby certify that I have listened to and transcribed one proceeding entitled Senate Do Pass Amended Passed, YEAS 19, NAYS 16, S.J. 672. I certify that this transcript is a true and correct transcription to the best of my knowledge and ability.

Dated the 17th day of April, 2006.

/s/ Cheryl H. Robinson
Professional Shorthand Reporter
and Notary Public

TRANSCRIPTION

RE: House Bill 1163, Senate Do Pass Amended Passed, Yeas 19, Nays 16, S.J. 672, 03/03/2003

The original transcript in the above-named matter was delivered to JOSEPH F. BECKER, Esq., on approximately APRIL 17, 2006.

Dated at Aurora, Colorado, this 17th day of April, 2006.

Original: Attached to original transcript

April 8, 2003

MEMORANDUM

TO: All Interested Persons

FROM: Charles D. McGuigan, Assistant Attorney General

RE: Legislation passed by the 2003 Legislature

The 2003 South Dakota State Legislature considered 510 pieces of legislation. The House introduced 284 bills and the Senate introduced 226 bills. The Governor signed 257 bills into law and the Legislature overrode one gubernatorial veto for a total of 258 new laws.

* * *

The legislature passed the following bills and, unless noted otherwise, the following will become law on July 1, 2003.

* * *

HB 1163 revises certain provisions related to hunting in public right of ways. The Act extends certain hunting safety zones around houses, farmyards and livestock. It also allows a hunter to shoot over private property if the bird flushed within the public right of way.

No. 05-1353

Supreme Court, U.S.
FILED
MAY 26 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROBERT BENSON and JUDITH BENSON,

Petitioners,

v.

STATE OF SOUTH DAKOTA; M. MICHAEL ROUNDS, in his official capacity as Governor of the State of South Dakota; LARRY LONG, in his official capacity as Attorney General of the State of South Dakota; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; and JOHN COOPER, in his official capacity as Secretary of the South Dakota Department of Game, Fish and Parks,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

RESPONDENTS' BRIEF IN OPPOSITION

LAWRENCE E. LONG
Attorney General
State of South Dakota

CRAIG M. EICHSTADT*
Deputy Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

Counsel for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Prior to 2003, South Dakota statutes provided that shooting over the land of another constituted a misdemeanor. In that year, the South Dakota Legislature removed the criminal penalty from such shooting to a limited degree. Thereafter the South Dakota Supreme Court interpreted this statute. That court said that the statute, S.D. Codified Laws (hereinafter SDCL) § 41-9-1.1(2), preserves all civil remedies available at common law or under statute while removing certain described, limited conduct from the crime of hunting trespass. Pet. App. 42-46. As the state court has finally determined the meaning of the state statute, the first two issues framed in the Petition are not before this Court. The two questions presented on this record are properly stated as follows:

1. Where a state statute removes criminal liability from certain trespass conduct, but all civil trespass remedies remain, has the State legislature effected a "taking" of land owners' property interests under the Fifth Amendment?

2. May a State legislature repeal criminal trespass prohibitions of certain conduct without incurring "taking" liability under the Fifth Amendment where all civil remedies remain for landowners?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	10
I. PETITIONERS' ARGUMENT REQUIRES THIS COURT TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE SOUTH DAKOTA SUPREME COURT ON THE MEANING OF A STATE STATUTE	10
II. THE SOUTH DAKOTA SUPREME COURT UNDERSTOOD AND CORRECTLY APPLIED THIS COURT'S TAKINGS PRECEDENT	11
III. THERE WAS NO TAKING AT ANY TIME AFTER THE PASSAGE OF THE STATUTE	16
IV. PETITIONERS' COMPLAINTS ABOUT THE INADEQUACY OF AN "AFTER THE FACT CIVIL REMEDY" ARE WITHOUT SUBSTANCE	18
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES:

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997) 10

Benson v. State of South Dakota, 2006 S.D. 8, 710 N.W.2d 131 11

Chicago v. Morales, 527 U.S. 41 (1999) 10

Griggs v. County of Allegheny, 369 U.S. 84 (1962) 13

Jackson v. Virginia, 443 U.S. 307 (1979) 19

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 19

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 9, 13, 14

Martinmaas v. Engelmann, 2000 S.D. 85, 612 N.W.2d 600 ..... 11, 12

Mullaney v. Wilbur, 421 U.S. 684 (1975) 10

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 9, 14

Portsmouth Harbor Land & Hotel Co. v. United States (Portsmouth II), 260 U.S. 327 (1922) 13

Reis v. Miller, 1996 S.D. 75, 550 N.W.2d 78 6

State v. Rumpca, 2002 S.D. 124, 652 N.W.2d 795 ..... 16, 17

CONSTITUTIONAL REFERENCES:

S.D. Const. art. V, §§ 1, 2 10

TABLE OF AUTHORITIES – Continued

Page

STATUTORY REFERENCES:

SDCL 22-41-2.2 7

SDCL 22-41-3.1 7

SDCL 22-41-3.4 7

SDCL 41-9-1 ..... 2, 7, 8

SDCL 41-9-1.1 ..... 4, 7

SDCL 41-9-1.1(2) ..... *passim*

SDCL 41-9-1.2 5

SDCL 41-9-1.3 5

SDCL 41-9-1.5 6

SDCL 41-9-1.6 6

SDCL 41-9-9 8

MISCELLANEOUS AUTHORITIES:

Rules of the Supreme Court, Rule 10 12

INTRODUCTION

Petitioners ask that this Court substitute its judgment for that of the South Dakota Supreme Court on the meaning of a state statute. The South Dakota Supreme Court held that SDCL 41-9-1.1(2) preserved for these landowners all traditional civil remedies against trespass, while removing certain defined, limited conduct from the crime of hunting trespass. The South Dakota Supreme Court held, citing this Court's precedent, that there was no taking because the statute did not constitute a governmental physical invasion, and did not cause Petitioners to lose the right to exclude others from their land. The South Dakota Supreme Court also emphasized the limited nature of the interference, and held that the criminal hunting trespass statutes continue to protect these landowners from much of the harm of which they complain.

The South Dakota Supreme Court understood and correctly applied this Court's takings precedent in light of its factual findings. After interpreting the statute, the South Dakota Supreme Court further analyzed the facts before it and determined, under this Court's precedent, that there was neither a per se invasion of Petitioners' property nor a regulatory taking. The statute, as interpreted by the South Dakota Supreme Court, does not require any landowner to allow shooting over his or her land, nor does it appropriate Petitioners' property nor frustrate any reasonable, investment-backed expectations Petitioners may have. The interpretation of South Dakota law did not change at any time after passage of the statute. Rather, the South Dakota Supreme Court held that it was interpreting the statute by its plain words. The statute means what it meant when it was passed.

Petitioners also argue that any civil remedy is inadequate. Petitioners, however, have no right to demand that a particular act be made criminal. This is a legislative, not a judicial decision, as the South Dakota Supreme Court stated. As the statute was interpreted by the South Dakota Supreme Court, there is no legislative act depriving Petitioners of any of their property.

STATEMENT OF THE CASE

This case involves constitutionality of a part of South Dakota's criminal regulation of hunting and whether it constitutes a taking of Petitioners' property under the Fifth Amendment. Prior to 2003, South Dakota criminal statutes prohibited shooting over another's land from a road right-of-way even though hunting on the road was not a violation. In 2003, the South Dakota Legislature adopted SDCL 41-9-1.1(2), which removed the criminal penalty for some limited shooting over private land. The South Dakota Supreme Court held that SDCL 41-9-1.1(2) did not constitute a "taking" under this Court's precedent. Pet. App. 27-52. The court interpreted the section, when considering it with other sections in the same chapter, as a repeal of criminal liability for certain limited, defined conduct. The statutes involved provide as follows:

> Except as provided in § 41-9-2, no person may fish, hunt or trap upon any private land not his own or in his possession without permission from the owner or lessee of such land. A violation of this section is a Class 2 misdemeanor and is subject to § 41-9-8.

SDCL 41-9-1.

Except for controlled access facilities as defined in § 31-8-1, interstate highways, unimproved section lines not commonly used as public rights-of-way, and highways within parks or recreation areas or within or adjoining public shooting areas or game refuges posted for restriction of an applicable use as hereinafter set forth by the Department of Game, Fish and Parks, § 41-9-1 does not apply to fishing, trapping, or hunting on highways or other public rights-of-way within this state that meet the requirements of § 41-9-1.3. For purposes of this section, hunting on highways or other public rights-of-way includes:

(1) The shooting at or taking by legal methods of small game, except mourning dove, that are located within the boundaries of the highway or public right-of-way;

(2) The shooting at or taking by legal methods of small game, except mourning dove, that are in flight over private land if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way.

If subdivision (2) of this section is declared by an advisory opinion or adjudication of the South Dakota Supreme Court to be a taking of private property requiring compensation, subdivision (2) is void.

No person, except the adjoining landowner or any person receiving written permission from the adjoining landowner, may use such highways or rights-of-way for the purposes of hunting defined in this title within a six hundred sixty-foot safety

> zone surrounding an occupied dwelling, a church, schoolhouse, or livestock. Neither the person discharging a firearm at small game nor the small game being shot at may be within the safety zone. No person, except the adjoining landowner or any person receiving written permission from the adjoining landowner, may use such highways or rights-of-way for the purpose of trapping within six hundred sixty feet of an occupied dwelling, church, or schoolhouse. A violation of this section is a Class 2 misdemeanor. If any person is convicted of knowingly discharging a firearm within six hundred sixty feet of any occupied dwelling, church, or schoolhouse for which such distance has been clearly and accurately marked and posted, the court shall, in addition to any other penalty, revoke the person's hunting privileges for a period of one year from the date of conviction.

SDCL 41-9-1.1.

> No person may hunt big game on interstate highways or controlled access facilities as defined in § 31-8-1 within this state.
>
> No person may discharge a rifle or bow and arrow at a big game animal from within the right-of-way of an improved public highway. However, any person who possesses a disabled hunter permit issued by the department to shoot from a vehicle as provided in § 41-8-37 may hunt on public rights-of-way adjoining publicly-owned hunting areas and on rights-of-way adjoining private lands with the written permission of the owner or lessee.
>
> Retrieval of lawfully taken big game is permitted on all public rights-of-way.

A violation of this section is a Class 2 misdemeanor.

SDCL 41-9-1.2.

For purposes of § 41-9-1.1 any public right-of-way along a section-line or other highway is open for public hunting, fishing, or trapping if:

(1) The right-of-way has been commonly used by the public for vehicular travel, as demonstrated by the existence of a well-worn vehicle trail; or

(2) An intentional alteration or adaptation has been made to the right-of-way to enhance the natural terrain's utility for vehicular travel or to permit vehicular travel where it was not previously possible.

SDCL 41-9-1.3.

In order to protect the public safety, it is the intent of the Legislature that hunting from highways or other public rights-of-way be accomplished without the use of motorized vehicles. Therefore, the following restrictions apply to such hunting:

(1) No person hunting small game from any highway or other public right-of-way pursuant to § 41-9-1.1 may discharge a firearm at any small game animal unless the motor vehicle by which the person has been transported to the hunting location has, to the maximum extent practical, been parked off the main traveled portion of the highway or public right-of-way in a manner that does not create an unreasonable risk of injury or damage to other persons or property using the highway or public right-of-way;

> (2) If the person who discharges the firearm is more than fifty yards from the vehicle, the doors on the side of the vehicle nearest the roadway shall be closed, but the engine may be running; and
>
> (3) If the person who discharges the firearm is less than fifty yards from the vehicle, all of the vehicle doors shall be closed and the engine shall be turned off.
>
> A violation of this section is a Class 2 misdemeanor.

SDCL 41-9-1.5.

> Any person who, while hunting a road right-of-way, negligently endangers another person, or puts that person in fear of imminent serious bodily harm, is guilty of a Class 1 misdemeanor.

SDCL 41-9-1.6.

The South Dakota Supreme Court has discussed the history of hunting regulation in South Dakota. In particular, the court stated that "for a great part of our history there were no, or only limited, criminal restrictions upon hunting." Pet. App. 53. The court stated that after South Dakota became a state in 1889, and for many years thereafter, there were no criminal penalties for "firing at a pheasant that was flying over private land." Pet. App. 53. Thus, although firing over private land was a crime in South Dakota for a short time, there were many decades where Petitioners, or others in their position, would have been limited to civil remedies. *See Reis v. Miller*, 1996 S.D. 75, ¶¶ 28-31, 550 N.W.2d 78, 84-85 (Gilbertson, J., concurring).

Section 41-9-1.1(2) is an exception to Section 41-9-1, which prohibits hunting, fishing, or trapping upon any private land without permission of the owner. The South Dakota Supreme Court found (Pet. App. 42-46) that neither Section 41-9-1 nor 41-9-1.1 purports to affect any noncriminal remedy that a landowner may have to exclude others from his or her land. The statutes remove certain limited conduct from the crime of hunting trespass. The statutes define what conduct constitutes a misdemeanor under South Dakota law.

Further, the language of Section 41-9-1.1(2) has not changed from the time of its adoption and effectiveness on July 1, 2003. The court said that it will not resort to external resources to interpret a statute where its words are "clear, certain and unambiguous." Pet. App. 46. The court also held that statements by administrative officials are not a part of the sovereign will of the people under South Dakota law. Pet. App. 41-43 n.13. Even with the repeal of some of the criminal liability for hunting trespass, landowners possess all rights to enforce their exclusive possession of land. Pet. App. 42-43 n.14. These rights include, among other things, treble damage remedies, private nuisance, trespass as a civil tort, trespass as a misdemeanor (other than hunting trespass), and injunction. *Id.*

The South Dakota Supreme Court also cited numerous other instances of decriminalizing conduct, or otherwise changing through statute, civil or criminal liability for the same conduct. For example, although civil liability for writing an insufficient funds check remains, certain instances of insufficient funds checks are not subject to criminal prosecution. SDCL §§ 22-41-2.2, 22-41-3.1, 22-41-3.4. The court noted decriminalization of adultery, which,

nonetheless, remains a ground for divorce. The court pointed to legislative restriction of civil liability for certain acts of selling alcoholic beverages to minors, while criminal liability remains. Finally, the court noted that the legislature has adopted SDCL 41-9-9, which retains civil liability for any person who is engaged in hunting and injures a person or property:

> Any person who is engaged, legally or illegally, in hunting is liable for any injury or death to any person or damages to property caused by the hunter's negligent actions. The injured person or the owner of the property that has been damaged may recover civil damages. Nothing herein shall abrogate any other provision of law.

SDCL 41-9-9.

The South Dakota Supreme Court also highlighted the fact that the legislature has retained criminal hunting trespass liability for some of the conduct relevant to this case. Pet. App. 44-45. For example, there is a 660-foot safety zone surrounding each occupied dwelling, church, school house, or any livestock, and Section 41-9-1.1(2) does not allow hunting within this 660-foot safety zone, nor does it allow any projectile to travel into this safety zone. Much of the conduct of which Petitioners complain below (shot hitting their home and a nearby shed; shooting around a home, buildings, or cattle) is still a crime under South Dakota law, Section 41-9-1.

Petitioners present an alternative interpretation to the interpretation of this statute by the South Dakota Supreme Court. This interpretation is based here, as it was below, on certain statements from state officials and individual legislators of what each of these persons believed the

statute means. The South Dakota Supreme Court rejected this interpretation. Pet. App. 41-42. The court held that these statements by state officials or legislators are not a part of the sovereign power of the State of South Dakota. The court also held that the hunting handbook excerpt Petitioners quoted does not deal with the subject of hunting on public road rights-of-way, but rather, deals with the subject of "unarmed retrieval," a concept that Petitioners have not challenged. Pet. App. 42 n.13, final paragraph.

In the South Dakota Supreme Court there was a majority for the opinion with this interpretation. A fourth justice agreed that there was not a Fifth Amendment taking, but based his view on his belief that the encroachment was limited, the legislature was entitled to balance the benefits and burdens, and the statute did not amount to either an actual physical invasion under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), nor was it a regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). A fifth justice believed that there was a taking because the legislature specifically allowed hunting, and did so in such a way as to physically occupy the land. Petitioners have adopted this justice's dissent on the meaning of this South Dakota statute.

Respondents do not contest the history of the course of the proceedings contained at pages 3-5 of the Petition. Respondents would point out that they asserted the decriminalization rationale in their answer, which was the first opportunity to assert it.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' ARGUMENT REQUIRES THIS COURT TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE SOUTH DAKOTA SUPREME COURT ON THE MEANING OF A STATE STATUTE.

This case concerns the constitutional implications of decriminalization of certain acts of hunting trespass. Prior to 2003, South Dakota statute criminally prohibited shooting over another's land. The challenged enactment decriminalized that action to a limited degree, but, in the judgment of the South Dakota Supreme Court, left all civil remedies intact. Pet. App. 42-43 n.14. This statutory interpretation is the definitive interpretation by the South Dakota Supreme Court, which is the highest state court and the court of last resort for interpretation of South Dakota statutes. S.D. Const. art. V, §§ 1, 2. This Court is bound by that court's interpretation of state statutes. As stated in *Chicago v. Morales*, 527 U.S. 41, 61 (1999), federal courts "have no authority to construe the language of a state statute more narrowly than the construction given by that state's highest court." This Court has repeatedly held that "state courts are the ultimate expositors of state law . . . and . . . we are bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 75-80 (1997) (encouraging federal courts, when there is a difficult and undetermined issue of state law, to seek an answer through the certification process; the state court interpretation of state law is definitive).

Petitioners' primary argument is that the South Dakota Supreme Court erred in its interpretation of state

law. But Petitioners may not seek to have this Court reinterpret a state statute that is clear on its face and that has been finally construed by the highest state court. Reference to statements of state officials or individual legislators who were considering the statute do not overcome the state court's holding. Under South Dakota law, "When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." *Benson v. State of South Dakota*, 2006 S.D. 8, ¶ 71, 710 N.W.2d 131 (Pet. App. 45-46) (citing *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611). The South Dakota Supreme Court not only has authority to make a final interpretation of this statute, but it did so according to the statute's plain words. This interpretation may not be impeached by declarations of others, which are not even expressions of the State's sovereign power. Pet. App. 41-42 n.13. Therefore, to the extent that the Petition depends on a reinterpretation of South Dakota law, it does not raise an issue for this Court's determination. The federal issues in this matter must be viewed through the lens of the South Dakota Supreme Court's interpretation of the statute. When viewed in that fashion, the South Dakota Supreme Court interpreted federal law correctly, and Petitioners have established no basis for a federal constitutional violation.

II. THE SOUTH DAKOTA SUPREME COURT UNDERSTOOD AND CORRECTLY APPLIED THIS COURT'S TAKINGS PRECEDENT.

While Petitioners argue that the South Dakota Supreme Court improperly applied this Court's cases, their

argument clearly lacks substance when one views the South Dakota Supreme Court decision. The South Dakota Supreme Court understood this Court's takings jurisprudence. It understood and correctly determined and applied those cases to the facts before it. Once the South Dakota Supreme Court determined the meaning of the statute, it examined this Court's precedent and applied it. Its decision is correct, and Petitioners have cited no authority in any court that conflicts with its decision. There further is no important question of federal law that has not been settled by this Court that ought to be so settled. Petitioners propose no new rule that would cause the result below to change. If anything, they allege only misinterpretation or misapplication of a state statute. *See* Rules of the Supreme Court, Rule 10.

Even though none of the considerations governing this Court's review on certiorari are applicable, it is plain that the South Dakota Supreme Court decision was correct. In interpreting the South Dakota statute, the South Dakota Supreme Court did nothing but track the words of the statute and give them their plain, ordinary meaning. Pet. App. 45-46. The court stated: "Again, we are reminded that legislative intent is determined from what the Legislature said, not what we think it said or others think it said." (Citing *Martinmaas*, 2000 S.D. 85, ¶ 49, 612 N.W.2d at 611.) Reading the words of the statute, the court came to the conclusion that its only effect is to remove certain defined conduct from the crime of hunting trespass. This conclusion is neither remarkable, unusual, nor incorrect.

Under this Court's precedent, there is no causal connection between SDCL 41-9-1.1(2) and the harm that Petitioners have undergone in this case, even if that harm took place. The South Dakota Supreme Court understood

this well, and cited *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (*Portsmouth II*) for the proposition that governmental action must be the cause in fact of specific harm for there to be a Fifth Amendment taking. Under this standard, which applies where a regulatory taking is alleged, *see Griggs v. County of Allegheny*, 369 U.S. 84, 87 (1962), the harm Petitioners allege arises not from the state statute, which merely decriminalizes certain hunting conduct, but from the conduct of hunters who are not agents of the State, nor can their actions be attributed to the State. Petitioners' injuries are caused by the hunters, not by the State. Moreover, as the court recognized (Pet. App. 41 n.13), the statute does not purport to take away the right to exclude, and thus the right to prevent such damage. Rather, it takes certain conduct out of a criminal statute while still allowing all "classical common law and statutory remedies for assertion of rights in private property." *Id.* at 43 n.13.

The South Dakota Supreme Court found that the statute undertaking this limited repeal of a crime is not the cause of Petitioners' harm.

Insofar as Petitioners attempt to assert a permanent physical invasion of their land, the South Dakota Supreme Court's interpretation of the statute and of the facts of the case led it to a conclusion that there was no permanent physical occupation under *Loretto*, 458 U.S. at 435. Unlike *Loretto*, there is no factual allegation of any "fixed structure on land or real property." Unlike *Portsmouth II*, 260 U.S. at 329, there has been no showing of diminution in value, and there has been no showing that the governmental entity itself has "the intention of firing [cannons] over claimants' land, and without the intent or ability to fire them except over that land." The South Dakota Supreme

Court's language as it analyzed this claim of actual physical invasion or occupation closely followed this Court's language in all of the applicable cases. Pet. App. 28-33. The South Dakota Supreme Court carefully considered all the facts alleged, carefully compared them to this Court's governing precedent, and, in light of its interpretation of the state statute, found that the conduct rendered non-criminal was limited to small game bird hunting seasons, applied only to licensed hunters, was limited to certain hours of shooting, applied only to a limited number of birds, and applied only where the bird had taken flight from the right-of-way or flew over the road right-of-way, where the hunter is located within that road right-of-way. The court also found that the conduct decriminalized is temporary in nature, takes place only during the hunting season, and, to the extent there is more harmful conduct (such as shooting around homes or livestock), it continues to be criminally prohibited.

In considering whether there was a *Loretto* per se taking, the Court also recognized that hunters who engage in conduct described in SDCL 41-9-1.1(2) "may do so without risking prosecution for a criminal offense." Pet. App. 32. Petitioners retain, however, their right to exclude hunters from their land, unlike Ms. Loretto, who was required to allow cable television equipment in her building. To the extent that Petitioners take issue with this application, they do so only on the basis of their varying interpretation of the statute. This Court may not overrule the South Dakota Supreme Court on that point.

Likewise, the court was correct in determining that there was no regulatory taking under the rationale of *Penn Central*. The court carefully noted and analyzed each of the *Penn Central* factors, including that the decriminalization it

found did not directly appropriate Petitioners' property, and that Petitioners did, by the traditional civil remedies, retain the right to exclude others from their property. The court also considered the economic impact of the regulation on Petitioners and interference with distinct investment-backed expectations. The court found that any economic injury resulted from the possible decrease in the number of game birds. The court found, however, that these game birds are now, and have always been, public property. Pet. App. 50-51. Petitioners may not, therefore, claim economic injury because some portion of a public resource will not be available to them. The statute, further, does not stop the landowners from granting servitudes and easements for hunting to others for a price. The landowners still may devote as much of their land as they wish to pheasant habitat, or to some other income-producing venture. But the State is not a guarantor of the game bird population, and that population is a publicly owned resource. Pet. App. 52.

The court noted, finally, that its rationale elsewhere applied fully to these factors as well: That is, the actions of the State in adopting the statute, decriminalizing certain activity but not prohibiting landowners' enforcement of their rights, does not cause damage to the landowners. Rather, the cause is action by hunters, which still constitutes a civil wrong against the landowners. The fact that their actions no longer constitute a crime is not the cause of any injury Petitioners claimed. The court correctly summed up its holding as follows:

> Reduced to its core, Landowners' argument is that the State faces two options: it must for the first time in its history be compelled by the Constitution to declare an act to be in violation of a

> criminal law or in the alternative pay Landowners for its refusal to do so. Landowners cite no case law to support this argument and we have been unable to find any court which has so held. This argument improperly attempts to shift the resolution of the issue from the legislative arena to that of this Court. While the Legislature certainly enjoys the legal authority to once again make this type of activity criminal in nature, there is nothing in our Constitution to compel it. To hold otherwise would be to rule that compensable takings have been ongoing since 1889, except for that short period of time when the Legislature chose to criminalize the conduct described in SDCL 41-9-1.1(2) . . . .
>
> Furthermore, any civil remedies that existed prior to the passage of SDCL 41-9-1.1(2) remain intact. In fact, Landowners cite no legislative roll-back of any civil causes of action that have existed for the protection of their property rights. At all times immediately prior to, and after this Court's holding in *Rumpca*, 2002 S.D. 124, 652 N.W.2d 795, and the legislative reaction to it by the amendment of SDCL 41-9-1.1(2), landowners' civil remedies against hunters remained the same.

Pet. App. 53-54.

III. THERE WAS NO TAKING AT ANY TIME AFTER THE PASSAGE OF THE STATUTE.

Petitioners argue that they suffered a taking between the time of the passage of the statute and either the supreme court's decision or the time that the State first asserted this defense on November 18, 2003. This contention relies on the proposition that a plainly worded statute

meant something else when it was passed than it meant when it was interpreted by the South Dakota Supreme Court.

No case law supports this novel argument. The temporary takings cases cited assume that the State used these landowners' land between the time the statute was passed and the time it was interpreted. The South Dakota Supreme Court decision precludes any such interpretation. That decision does not indicate that it is changing the meaning of the statute. Rather, it states clearly that it is taking the legislature at its word "from what the legislature said, not what we think it said or others think it said." Pet. App. 46. The court stated explicitly that "at all times immediately prior to, and after this court's holding in *Rumpca*, 2002 S.D. 124, 652 N.W.2d 795, and the legislative reaction to it by the amendment of SDCL 41-9-1.1(2), landowners' civil remedies against hunters remained the same." Pet. App. 54.

This holding by the South Dakota Supreme Court on an issue of state law precludes any argument that civil remedies differed at any point between the decision in *State v. Rumpca*, 2002 S.D. 124, 652 N.W.2d 795, the enactment of the statute, and the court's decision on the statute. As a matter of state law, those remedies have not changed. Since the remedies are present under state law, there can be no violation of federal law for failure to have them in place. Argument II of the Petition is without substance, as there has been no change in the meaning of the applicable statute since it was passed. Pet. App. 54.

IV. PETITIONERS' COMPLAINTS ABOUT THE INADEQUACY OF AN "AFTER THE FACT CIVIL REMEDY" ARE WITHOUT SUBSTANCE.

The State does not dispute the proposition that an owner of real property has the right to use it to the exclusion of all others. Petitioners argue, however, that a civil remedy is inadequate and the State must provide criminal liability against those shooting over Petitioners' property. One answer to this distinction between "before the fact" and "after the fact" remedies is that criminal liability is equally "after the fact" to civil liability. There is no more ability, with the crime in place, to exclude the armed hunter from shooting over Petitioners' property than there would be without. It is obvious that the existence of criminal prohibition in the statute does not prevent crimes "before the fact" from occurring. While the power of the State may be directed toward solving and punishing the crime, that punishment no more occurs "before the fact" of the crime than would a civil remedy.

Moreover, as the South Dakota Supreme Court pointed out (Pet. App. 22-24), the State of South Dakota did not originally provide for criminal prosecution of those who trespassed by hunting. Rather, regulation of hunting has varied over the years, and has never provided a vested right in criminal prosecution of those who committed a hunting trespass. Petitioners' apparent argument that all trespass by hunting must be criminal flies in the face of history. Unless the original South Dakota Legislature committed a taking of Petitioners' land merely by failing to criminalize all trespasses against it, Petitioners' argument must fail.

Further, Petitioners either fail to grasp, or intentionally play down, the inevitable conclusion of their third argument. It simply cannot be the case that Petitioner property owners have a right to demand criminal prohibition and prosecution of all forms of trespass to land. This Court has held, to the contrary, that those who are not challenging their own prosecution "lack[] a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

As Justice Zinter in concurrence recognized below (Pet. App. 17-18), the landowners lack an interest in the prosecution or nonprosecution of individual hunters, and they thus are unable to establish a causal connection between their injury and the conduct complained of. Pet. App. 18.

Under this Court's precedent, Petitioners who are not threatened with prosecution under this criminal statute have no right to demand that it be enacted, repealed, or otherwise changed. As the South Dakota Supreme Court recognized (Pet. App. 54), determining whether a particular act ought to be criminal is a legislative question, not a matter for the judiciary, and it may not support a taking. This Court has also held that defining state crimes is a function of state law, not of federal law. *Jackson v. Virginia*, 443 U.S. 307, 324 n.16 (1979). Petitioners may not demand that the criminal law be rearranged or that it be changed so that it is more to their liking, and it does not constitute a taking for the legislature to refuse to make all civil trespasses criminal.

CONCLUSION

Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LAWRENCE E. LONG
Attorney General
State of South Dakota

CRAIG M. EICHSTADT*
Deputy Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
Counsel for Respondents

**Counsel of Record*

No. 05-1353

Supreme Court, U.S.
FILED
JUN 5 - 2006
OFFICE OF THE CLERK

In The Supreme Court of the United States

ROBERT BENSON and
JUDITH BENSON,

Petitioners,

v.

STATE OF SOUTH DAKOTA; M. MICHAEL ROUNDS, in his official capacity as Governor of the State of South Dakota; LARRY LONG, in his official capacity as Attorney General of the State of South Dakota; SOUTH DAKOTA DEPARTMENT OF GAME, FISH, AND PARKS; and JOHN COOPER, in his official capacity as Secretary of the South Dakota Department of Game, Fish and Parks,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

PETITIONERS' REPLY BRIEF

JOSEPH F. BECKER*
**Counsel of Record*
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
I. THIS COURT SHOULD GRANT *CERTIORARI* WHERE THE CLEAR MEANING OF A STATE STATUTE IS IGNORED BY THAT STATE'S HIGHEST COURT AND THIS COURT'S TAKING PRECEDENT IS MISAPPLIED	1
II. THE SOUTH DAKOTA SUPREME COURT MISAPPLIED THIS COURT'S PRECEDENT AND THUS A TAKING OCCURRED, AT A MINIMUM, BETWEEN PASSAGE OF THE STATUTE IN QUESTION AND THE STATE SUPREME COURT'S DECISION	3
III. SOUTH DAKOTA ERRS IN SUPPOSING THAT AN AFTER-THE-FACT CIVIL REMEDY IS EQUALLY PROTECTIVE OF PETITIONERS' RIGHT TO EXCLUDE AS IS A CRIMINAL REMEDY	5
IV. MERE DECRIMINALIZATION, AS ARGUED BY SOUTH DAKOTA, DOES NOT PRECLUDE A TAKING REQUIRING JUST COMPENSATION	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Benson v. State of South Dakota, 710 N.W. 2d 131 (S.D. 2006) 7

Benson v. State of South Dakota, Civ. 03-121 (6th Jud. Cir. Dec. 17, 2004) 6

Loretto v. Manhattan CATV Corp., 458 U.S. 419 (1982) 4, 5

CONSTITUTIONAL PROVISION

S.D. Const. Art. VI, § 13 7

STATUTE

SDCL § 41-9-1.1(2) 1

OTHER AUTHORITY

CNN.com, *Five hunters killed in Wisconsin woods*, http://www.cnn.com/2004/US/11/22/hunters.slain/ (last viewed June 4, 2006) 6

INTRODUCTION

The State of South Dakota mischaracterizes this case as one concerning the constitutional implications of a decriminalization statute, Respondents' Brief in Opposition ("Resp. Br.") at 10, and, as such, argues that this Court should not substitute its judgment for that of the South Dakota Supreme Court.

The factual background does not, however, support these contentions, which ignore the State's comprehensive regulatory system controlling every aspect of hunting. No other conclusion may be gained from a plain reading of the statute, which provides, in relevant part, that lawful "hunting on highways or other public rights-of-way includes . . . [t]he shooting at or taking by legal methods of small game, except morning dove, that are in flight *over private land* if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way." SDCL § 41-9-1.1(2) (emphasis added).

ARGUMENT

I. THIS COURT SHOULD GRANT *CERTIORARI* WHERE THE CLEAR MEANING OF A STATE STATUTE IS IGNORED BY THAT STATE'S HIGHEST COURT AND THIS COURT'S TAKING PRECEDENT IS MISAPPLIED.

South Dakota contends that, where the plain meaning of a statute is clear, certain, and unambiguous, the interpretation of that statute may not be addressed by this Court. To the extent the language of the statute is clear,

certain, and unambiguous, its meaning is inapposite to that given it by three of the five justices of the South Dakota Supreme Court. In fact, the trial court, two of the five South Dakota Supreme Court Justices, the administrative agency, South Dakota's legislature, and even the Office of the South Dakota Attorney General (prior to this legal challenge) each came to the conclusion that the plain meaning of the statute was not one of decriminalization but rather an alteration of South Dakota's comprehensive regulatory hunting scheme to make fully lawful the act of shooting over private property.

South Dakota, in arguing that this Court may not hear this case, asserts that "[t]he interpretation of South Dakota law did not change at any time after passage of the statute." Resp. Br. at 1. This is quite simply not true. The same Attorney General's office that, upon the instant challenge of this State law, asserted "mere decriminalization" as one of its twenty-two affirmative defenses, had summarized, upon passage, the very same legislation as allowing "a hunter to shoot over private property if the bird flushed within the public right of way." Petitioners' Appendix ("App.") at 165.

Similarly, the South Dakota Department of Game, Fish and Parks, the state agency tasked with implementing the statute, published the State's official hunting manual (described therein as a "synopsis of South Dakota Codified Laws and Game, Fish and Park rules."; App. at 110) wherein the agency informed hunters that they could now shoot lawfully over and onto private property.

Even the legislative debate consisted almost entirely of whether the State's tradition of road hunting should trump a citizen's right to exclude hunters from private

property and contained no mention whatsoever of decriminalization. In fact, the legislature included a provision in the statute that nullified the statute's amendment in the event the South Dakota Supreme Court held shooting over private property to be a taking. That provision makes no sense if the "clear" meaning of the statute is what three South Dakota Supreme Court Justices so conveniently found it to be.

The statute may be clearly understood as interpreted by the legislature, by the Attorney General's summary of the legislation, and by the expert state agency responsible for implementing the statute. That clear meaning was ignored, however, by South Dakota's highest court and in so doing that court misapplied this Court's taking precedent.

II. THE SOUTH DAKOTA SUPREME COURT MISAPPLIED THIS COURT'S PRECEDENT AND THUS A TAKING OCCURRED, AT A MINIMUM, BETWEEN PASSAGE OF THE STATUTE IN QUESTION AND THE STATE SUPREME COURT'S DECISION.

In its Brief in Opposition, South Dakota mistakenly contends that Petitioners rely on "the proposition that a plainly worded statute meant something else when it was passed than when it was interpreted by the South Dakota Supreme Court." Resp. Br. at 16. In actuality, however, it was the Attorney General's Office that, upon passage, summarized the legislation as making lawful the shooting onto private property and that, upon legal challenge, changed its interpretation.

South Dakota also contends that "no case law supports" Petitioners' "novel argument" that a taking occurred between passage of the legislation and the time at which the South Dakota Supreme Court issued its decision. South Dakota is incorrect in both assertions.

South Dakota makes these assertions as though the statute in question was passed, interpreted, implemented, and thereafter remained in a vacuum for nearly three years until the South Dakota Supreme Court issued its opinion. No such vacuum existed. Rather, for nearly three years, hunters' potentially fatal projectiles crossed Petitioners' private property. In early affidavits, Petitioners swore that the number of projectiles upon their properties increased significantly as a result of the State's actions regarding HB 1173. To these facts, South Dakota stipulated.

Not one legislator in the entire contentious debate regarding the statute in question ever hinted, let alone argued, that the statute was in any way a "mere decriminalization" statute. App. at 115-64. Moreover, after passage, State attorneys and administrative officials, through publications, made it quite clear that shooting over private property was lawful when done from within public rights-of-way.

As to South Dakota's assertion that "no case law exists" to support Petitioners' "novel" argument that a taking occurred between the passage and implementation of the statute and the time the South Dakota Supreme Court issued its opinion, South Dakota is again in error.

Petitioners could, for example, rely almost exclusively on *Loretto* in support of their claim. "[W]here governmental action *results* in "a permanent physical occupation" of

the property, by the government itself *or by others*, [the United States Supreme Court] uniformly ha[s] found a taking." *Loretto v. Manhattan CATV Corp.*, 458 U.S. 419, 432-35 (1982).

Projectiles rained upon Petitioners' property as a direct result of actions by South Dakota government officials. The legislation itself, subsequent declarations by state officials, and official publications by the State encouraged hunters to shoot onto private property from public rights-of-way. To escape liability, South Dakota now seemingly denies that its legislature, Attorney General's office, and Department of Game, Fish and Parks are government actors or that the actions of these government employees constitute the "government action" addressed by this Court in *Loretto*.

III. SOUTH DAKOTA ERRS IN SUPPOSING THAT AN AFTER-THE-FACT CIVIL REMEDY IS EQUALLY PROTECTIVE OF PETITIONERS' RIGHT TO EXCLUDE AS IS A CRIMINAL REMEDY.

South Dakota argues that it is "obvious" that after-the-fact civil remedies are equally protective of Petitioners' right to exclude. Resp. Br. at 18. This is not the case.

Where a State assumes its proper role of protecting individual rights against initiations of force by others, a call to the local law enforcement agency would, in theory, evoke a response to the scene at which time a law enforcement officer could compel, by force if necessary, the shooter to discontinue the firing of his weapon onto another's private property. Under the law in question, according to South Dakota's own pleadings, Petitioners no longer have this right because "state and local law

enforcement will no longer act to prevent or curtail such activity." *Benson v. State of South Dakota*, Civ. 03-121 (6th Jud. Cir. Dec. 17, 2004). App. at 95-96.

Unless South Dakota means to suggest that a property owner must now assume responsibility for law enforcement and confront the armed shooter, make a citizen's arrest (where no criminality is said now to exist), and force the shooter to discontinue firing his weapon, there is a significant difference in the property owner's right to exclude as compared to a situation where local law enforcement officials may be summoned. Of course, even if a property owner assumes the role of hunter patrol, he would still be less effective insofar as he would not command the perceived legitimacy of that enjoyed by government-sanctioned law enforcement officials.

Unfortunately, one example of how such a private-to-private confrontation may play out was witnessed recently in nearby Wisconsin. The tragic results of these citizens taking property enforcement matters into their own hands resulted in the slaying of five persons and the serious injury of several others.[1] Two members of the South Dakota Supreme Court and the trial court held that such a vigilante-friendly interpretation of the statute in question "makes no sense." *Benson*, Civ. 03-121 (6th Jud. Cir. Dec. 17, 2004). App. at 97-98.

---

[1] "Sheriff's deputies are investigating the killings of five hunters Sunday in northwest Wisconsin – bloodshed apparently sparked by a dispute over a hunting spot. A suspect has been arrested." "This is completely nuts," said Chief Deputy Tim Zeigle of the Sawyer County Sheriff's Department. "Why? I mean, five people dead because somebody was trespassing on property. It makes no sense." CNN.com, *Five hunters killed in Wisconsin woods*, http://www.cnn.com/2004/US/11/22/hunters.slain/ (last viewed June 4, 2006).

Only if South Dakota assumes that each hunter fires only one shot and then immediately moves on to shoot on some other private property does the State's notion that both after-the-fact civil remedies and criminal remedies are equally effective hold true. Absent some opportunity to enlist the aid of a law enforcement officer to force the shooter to discontinue the firing of additional projectiles over and onto their property, one must ask for what reason do Petitioners pay taxes?[2] Moreover, "Article VI, §13 of the South Dakota Constitution' 'vests in an owner of property the right to prevent the taking or damaging of property *until* compensation is paid.'" *Benson*, Civ. 03-121 (6th Jud. Cir. Dec. 17, 2004). App. at 99 (emphasis added).

IV. MERE DECRIMINALIZATION, AS ARGUED BY SOUTH DAKOTA, DOES NOT PRECLUDE A TAKING REQUIRING JUST COMPENSATION.

Even if, contrary to the facts of this case, this Court were to take South Dakota at its "post-litigation" word that the legislature's action merely decriminalized the shooting onto private property, when this state action results in a physical occupation (even by a third party) a taking has occurred. For, even if, as argued by South

[2] "[W]hat is worrisome about the [South Dakota Supreme] Court's decision . . . is its rationale. It reasons that private property can be opened to public use through the expedient of 'decriminalizing' the very laws that protect private property. This ignores an essential function of our constitutional form of government." "A Government is instituted to protect property of every sort . . . This being the end of government, that alone is a just government, which impartially secures to every man that which is his own." *Benson v. State of South Dakota*, 710 N.W. 2d 131 (S.D. 2006) (Justice Kokencamp concurring) (citing James Madison). App. at 58.

Dakota, Petitioners have no "right to demand criminal prohibition and prosecution" of dangerous trespass actions by hunters, it does not necessarily follow that this lack of a right to demand criminality precludes Petitioners' right to demand just compensation when that "decriminalization," combined with acts of encouragement by arms of the State apparatus, results in shot traversing Petitioners' private property.

In fact, if one takes South Dakota at its word that the legislature was merely decriminalizing the trespass, the legislature itself, by including a provision to nullify the entire statute if a taking were found, must have well understood that this "decriminalization" may indeed result in and not be mutually exclusive of an unconstitutional taking.

Moreover, the statute's nullification provision makes eminently more sense when read in the context consistent with the initial legislative, administrative, and executive branch interpretation of the statute; that is, the law caused an alteration of South Dakota's comprehensive regulatory hunting scheme to make fully lawful the shooting onto private property from public rights-of-way.

CONCLUSION

This Court should grant *certiorari* and remand this case to the South Dakota Supreme Court with instructions to apply correctly this Court's physical-invasion takings precedents, after which the South Dakota Supreme Court must nullify the statute in question subject to its own nullification provision.

Respectfully submitted,

JOSEPH F. BECKER*
**Counsel of Record*
WILLIAM PERRY PENDLEY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Petitioners